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A TREATISE

ON THE

LAW OF CARRIERS

AS

ADMINISTERED IN THE COURTS OF THE UNITED STATES, CANADA AND ENGLAND

BY

ROBERT HUTCHINSON

THIRD EDITION

BY

J. SCOTT MATTHEWS

AND

WILLIAM F. DICKINSON

MEMBERS OF THE CHICAGO BAR

VOLUME I

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PUBLISHERS' NOTE TO FIRST EDITION.

In 1875 it came to our knowledge that the author of this volume had been giving great attention to the subject of "Carriers," and had prepared considerable material for a treatise. We felt confident that the legal profession were even then ready to greet a new work on this subject, and that Mr. Hutchinson was, by reason of his large acquaintance with the subject and his extended studies, well fitted to respond to the evident want of the profession. But to our request to complete his labors, Mr. Hutchinson was unable to accede, owing to a press of professional duties requiring all his attention.

In 1877, however, the proposition being renewed, he consented to prepare the manuscript, and thereafter labored unceasingly till the last line of the text was written. A few days after he announced to us the completion of the last chapter, and of his intention to forward it to the printers, we received the melancholy news of his death from yellow fever, near Memphis. A considerable portion of the work had been stereotyped, all of the text was written, but neither the analysis of contents, the table of cases, nor the index, was constructed, and it was necessary that the main body of the text be read, that the citations be corrected in proof, and that the last chapter be revised.

This necessary work, the Hon. James O. Pierce, Judge of the

The editor desires to make public acknowledgment to Mr. JOHN W. BEAUMONT, of the Detroit Bar, who has rendered him much aid, particularly in revising the chapters on Baggage and Actions against Carriers for Injuries to Goods.

The editor trusts that the work done upon the second edition may not be found unworthy a place beside the excellent work done upon the first.

FLOYD R. MECHEM.

DETROIT, July 1, 1891.

EDITORS' NOTE TO THIRD EDITION.

REALIZING that much of the first edition of this work has become a classic on the subject of Carriers, it has been the endeavor of the editors of this edition to follow as closely as possible the method of treatment pursued by the original author. Since, however, many new questions involving the subject of Carriers have arisen and been passed upon by the courts subsequent to the publication of the second edition, it has been found necessary to add many new sections, and to supplement or to rewrite many of the old. The treatment of the important subject of Conflict of Laws has been extended to twenty-five sections of concrete rules of law. The Harter Act, which revolutionizes the law in reference to the carriage of goods on the high seas and great lakes, has been extensively considered. An entirely new exposition of the substantive sections of the new Interstate Commerce Act and of the State laws for the regulation of rates has been added, while the question of the carrier's right to limit his common-law liability, which has been the subject of conflicting decisions by different courts, has been given careful attention and those decisions which are authoritative have been pointed out. The single section on demurrage in the second edition has been expanded into a general treatment of the entire subject. Much new matter has been added through the various chapters, under appropriate headings, on the subject of connecting carriers. The chapters dealing with carriers of passengers may be said to be entirely rewritten.

The English, American and Canadian reports have been care-

fully searched, and every case of importance on the subject of Carriers (excluding cases on Street Railways) which has been decided since the second edition of this work has been used. About six thousand new cases have been added to those cited in prior editions, and citations have been given to the State Reports, American State Reports, Lawyers Reports Annotated and National Reporter System wherever possible.

Owing to the amount of new matter added, it was found impossible to retain the old section numbers, and new numbers have been given throughout. In order to preserve the benefit of citations of former editions in judicial opinions, the old section numbers have been placed in parenthesis immediately following the new numbers.

The subject index has also been greatly extended. Each point has been indexed at least twice, once under a general heading and once under a particular heading, but generally under several headings. In using the index, time may be saved by referring first to particular headings.

The editors desire to acknowledge the valuable assistance of WILLIAM J. MATTHEWS in the matter of proof reading and arranging the table of cases.

J. SCOTT MATTHEWS,
WILLIAM F. DICKINSON.

CHICAGO, October 15, 1906.

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THE LAW OF CARRIERS

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CHAPTER I.

OF BAILMENTS AND CARRIERS GENERALLY.

§ 1. Bailment defined.
2. Classification of bailments.
3. Application of rule to carriers.
4. Liability of common carrier distinguished from that of other bailees.
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14. Bailees liable for malfeasance and fraud.

Sec. 1. (§ 1.) Bailment defined.—Every carrier of goods is a bailee; for their carriage necessarily presupposes the delivery of the goods for that purpose; and the delivery of goods on a condition, expressed or implied, that they shall be restored or accounted for by the bailee to the bailor according to his directions, as soon as the purpose for which they are bailed shall be answered, constitutes a bailment. The word bailment is therefore one of very comprehensive signification, and includes, in its general meaning, all cases in which personal property is intrusted by one person to another, under an engagement, either express or implied, to keep, to carry, to improve, to mend or repair, or for the purpose of having any special service performed in respect to it, and, when the special purpose shall have been accomplished, to return it to the owner or to deliver it to another, according to the bailor's

directions, or to conform to the object or purpose of the trust, whatever it may be.[1]

Sec. 2. (§ 2.) Classification of bailments.—According to the compensation to be received, the degree of responsibility to be assumed, or the character of the duty to be performed by the person to whom the bailment is made, who is called the bailee, bailments have been divided into number of classes, and some of these classes again into subdivisions. This classification was first brought into the common law by Lord Holt in his celebrated judgment in the case of Coggs *v.* Bernard,[2] and is said to have been adopted by him from the civil law.[3] The most general division of them according to this classification is into, *first*, such as are for the exclusive benefit of the bailor or of some person other than the bailee; *secondly*, such as are for the exclusive benefit of the bailee; and *thirdly*, such as are for the benefit of both parties. The first of these divisions includes what are known as deposits (*depositum*), which are naked bailments of goods to be kept for the bailor without recompense and to be returned when the bailor shall require it, and mandates *(mandatum)*, which are defined to be bailments of goods to be carried from place to place or to have some act performed about them without reward or recompense; the second embraces only gratuitous loans to the bailee (*commodatum*); and the third pledges to secure a debt or the fulfillment of some engagement, and a hiring for reward or compensation (*pignus*); and this last subdivision is again divided into the hiring a thing for use (*locatio rei*); the hiring of work and labor (*locatio operis faciendi*); the hiring of care and services to be performed on the thing delivered (*locatio*

1. Various definitions of bailment are given in Schouler on Bailments and Carriers, § 2, note. Mr. Schouler himself defines bailment as "A delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished." *Id.* § 2. See, also, Mr Schouler's note to Coggs *v.* Bernard, 1 Smith's Leading Cases, 9th Am. Ed., 400.

2. Lord Raym. 909; 1 Smith's Ld. Cases 283.

3. Story on Bail., § 8.

custodiae); and the hiring of the carriage of goods from one place to another (*locatio operis mercium vehendarum*).[4]

Sec. 3. (§ 3.) Application of rules to carriers.—According to these divisions and definitions, the carriage of goods is always either a *mandate,* when it is gratuitous or without compensation to the carrier, or a *hiring,* when he is paid for the service; and under these heads, the duties and obligations of carriers of goods were formerly treated in connection with the general subject of bailments and as a part of it. But it must be evident from this statement that, while this classification of the different kinds of bailments according to their various purposes may be extremely convenient for the treatment of the general subject in all its different branches, it is almost wholly unimportant in connection with the subject of the duties and liabilities of the carriers of goods, except to show in what particular character of bailment the carrier holds the goods intrusted to him, and that, which is equally apparent, most of the general principles of the bailments of goods have little or no application to questions in which he may be concerned. Besides, the extraordinary responsibilities which are imposed by the law upon common or public carriers of goods for hire,[5] who are by far the most important agents of commerce in modern times, are founded upon reasons which have no application to ordinary bailments, and in fact make such carriers exceptions from the general rules and principles by which the liability of other bailees is to be tested.

Sec. 4. (§ 4.) Liability of common carrier distinguished from that of other bailees.—It will therefore be found that while private carriers, whether with or without reward, are strictly bailees and nothing more, and that questions as to their liability are to be determined by the ordinary rules which govern the responsibility of bailees, the common carrier of goods stands upon an entirely different footing, and when

4. Lord Holt's classification was, in terms, into "six sorts of bailments," but the six sorts naturally reduce themselves to the three greater classifications given in the text. See Schouler, Bailments, § 14.

5. See *post,* § 4.

questions as to his liability for the loss of the goods or their injury whilst in his custody for the purpose of carriage arise, they must be decided upon principles peculiarly applicable to them, and which have no application to any other kind of bailment except that to the innkeeper by his guest. In all other cases of bailment, for instance, the very foundation of the bailee's liability is negligence in some degree, either greater or less, according to the particular nature of the bailment, and before he can be made liable the requisite negligence must be shown. But the question of negligence, when the purely common-law relation of common carrier to the goods exists, is ordinarily wholly foreign to the inquiry whether such a carrier is to be held liable for their loss or injury, and, as will hereafter be seen,[6] evidence on his part of the most exact diligence will be wholly irrelevant and inadmissible. If, for example, the private carrier or any other ordinary bailee be robbed of the goods,[7] or if they should be accidentally destroyed by fire or any other calamity, without negligence on his part,[8] the law will excuse him; but if they be taken from a common carrier by a force ever so irresistible less than the public enemy,[9] or if they should be destroyed by fire ever so unavoidable,[10] he will nevertheless be liable for them. He is an insurer of the goods against all losses except those caused by the act of God, the public enemy, the law, the owner, or the inherent nature of the goods.[11] His extraordinary liability rests upon a rule of law, applicable to but two classes, which had its rise in reasons of public policy,[12] and not upon the contract of bailment, although without the bailment the liability cannot exist.

Sec. 5. (§ 5.) Questions of negligence in law of carriers.— Still, questions of negligence are of constant occurrence in dealing with the subject of the liability of carriers. The private carrier cannot be held liable unless it be shown that he

6. See *post*, §§ 266-319.
7. See *post*, § 39.
8. See *post*, § 40.
9. See *post*, § 315.
10. See *post*, § 279.
11. See *post*, §§ 269-319.
12. See *post*, § 315.

has been guilty of either negligence or misfeasance which has occasioned the loss.[13] The liability of the passenger carrier for an injury to his passenger generally depends exclusively upon the question of negligence.[14] And, although the common carrier of goods, when he is not protected by contract, is liable for the consequences of every casualty resulting in the loss of the goods, except such as are excepted by the law as above stated, yet when he attempts to exonerate himself from liability by showing that the cause of the loss comes within one or the other of these exceptions, he may be met by proof that, but for his negligence, the occasion of the loss would have been avoided.[15] So, if the goods be of a perishable nature, and he attempt to defend himself against liability for their loss by showing that it was attributable to the principle of inherent infirmity and decay, as he may do, it may be shown that he failed to bestow upon them the necessary care to arrest or prevent such decay, and was therein guilty of negligence but for which the loss would not have occurred.[16] And when he has made exceptions to his liability by his contract in addition to those allowed him by the law, and undertakes to screen himself from liability for a loss by showing that it was produced by one of the excepted causes, it will be a complete avoidance of his defense to show that he did not use the proper diligence to prevent or to escape from the danger.[17]

Sec. 6. (§ 6.) Degree of diligence required depends on circumstances.—The liability of all carriers of goods may therefore turn upon the question of negligence; and hence the law as to the liability of bailees in general for negligence, of which the law of bailments is in a large part made up, becomes frequently of the greatest importance in furnishing the rule as to the degree or character of the negligence for which the carrier as well as other bailees will be held responsible. It is evident, however, that the same degree of care and diligence

13. See *post*, § 37 *et seq.*
14. See *post*, § 892 *et seq.*
15. See *post*, § 319.
16. See *post*, §§ 337, 338.
17. See *post*, § 477.

in the custody of the goods should not be required of the bailee under all circumstances; and it follows as a consequence that there cannot be a more inflexible rule as to the degree of negligence which will put him so much in fault as to make him responsible for the loss or injury which may ensue; "for negligence in a legal sense," says a distinguished writer and judge, "is no more nor less than this: the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."[18] "A man would not be expected to take the same care of a bag of oats as of a bag of gold; of a bale of cotton, as a box of diamonds or other jewelry; of a load of common wood, as of a box of rare paintings; of a rude block of marble, as of an exquisitely sculptured statue. The value, especially, is an important ingredient to be taken into consideration upon every question of negligence; for that may be gross negligence in the case of a parcel of extraordinary value, which in the case of a common parcel would not be so."[19] So the customs of trade or of particular places are to be taken into consideration; for that care and attention which are bestowed upon their goods by those engaged in a particular trade, or generally or universally by those who inhabit a particular place or locality, may be very fairly taken as evidence that that degree of care and attention was all that was needed for their protection or preservation. So too it cannot be doubted but that the bailee's duty would require him to be more vigilant at some times and at some places than at others, and the same conduct which might be considered prudent at one time or at one place would perhaps be deemed negligent at another. A man, for instance, intrusted with a large sum of money, might prudently venture to travel alone with it in the day-time, when it would be imprudent to do so at night, or by one route when it would be rashness to undertake the same journey by another. And goods entrusted to a bailee might require very

18. Cooley on Torts, 630. 19. Story on Bail., § 15.

different attention at one season or in one climate from that which would be required in another. Goods of great weight or bulk might be prudently left unguarded, while those of smaller bulk, and more liable for that reason to be stolen, should be carefully watched. So if robbers or highwaymen are known to infest a particular district or country, much more precaution will be required of the bailee than in districts which are not so infested; and if the bailee undertake to carry the goods through a hostile country by his servants or agents, care will be required in the selection of such servants as may be possessed of the requisite coolness and courage for the emergencies which may arise, qualities which might be wholly unnecessary in those otherwise employed.[20] In short, the bailee must proportion his care as well to the risk and danger to which the goods may be exposed as to the extent of the loss which is likely to be sustained by improvidence on his part, and all the circumstances of time and place, of the value and character of the goods, and the usages and customs of others, placed in similar situations and engaged in the same business, must be weighed and considered in order to arrive at a correct conclusion with regard to the conduct of the bailee.

Sec. 7. (§ 7.) Negligence in one bailee not necessarily so in another.—It is also obvious that that which would be gross negligence in one bailee might not be so in the case of another. A person professing the required skill for the purposes of the bailment, although it might be undertaken upon an agreement that no compensation was to be paid, would be liable for a failure to apply that requisite skill, whether he really possessed it or not. This is illustrated by the case of Shields *v.* Blackburne,[21] in which the defendant, at the request of the plaintiff, voluntarily and without compensation, undertook to send to him a quantity of leather which the defendant by mistake entered as wrought instead of as dressed leather, in

20. Holladay *v.* Kennard, 12 Wall. 254.

21. 1 H. Bl. 158.

consequence of which it was seized by the government. The question being whether the defendant was liable for the loss of the leather occasioned by his mistake, Lord Loughborough is reported to have said: "I agree with Sir William Jones that when a bailee undertakes to perform a gratuitous act from which the bailor alone is to receive benefit, then the bailee is liable only for gross negligence. But if a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If, in this case, a shipbroker or a clerk in the custom-house had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily implies a competent degree of knowledge in making such entries." This, however, as is manifest, is not making an exception to the general rule, since it does not render an unpaid bailee or agent liable for less than gross negligence, but renders that gross negligence in some agents which would not be so in others.[22]

Sec. 8. (§ 8.) Apportionment of diligence according to benefit.—It must also be evident that if degrees in diligence or in its opposite, negligence, are to be admitted at all to qualify the responsibility of the bailee, some distinction should be made between cases in which the bailment is for the exclusive benefit of the bailor and those in which the advantage is all on the side of the bailee, or in which it is mutually beneficial. Such a distinction seems at once rational, just and convenient, and we find it accordingly adopted in the common law of bailments. When, therefore, the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee and makes him liable only for gross neglect. When it is for the sole benefit of the bailee, the law requires great diligence on his part and makes him liable for slight neglect; and when it is or is intended to be reciprocally beneficial to both parties, ordinary diligence on

22. Wilson *v.* Brett, 11 M. & W. 113.

the part of the bailee is required and he becomes responsible for ordinary neglect.[23] And a like apportionment of the extent of diligence to be required and of the responsibility to be incurred by bailees, according to the benefit which is to accrue from the bailment, is said to be made universally in the laws of civilized nations.

Sec. 9. (§ 9.) Law of bailments insufficient to determine liability of common carrier.—It follows, as a necessary consequence from what has been said, that the law of bailments, as has been already incidentally mentioned, consists, in a great measure, of rules and principles by which the liabilities of persons who are intrusted with the custody of the chattels of others is to be determined when such chattels have been lost or injured by the negligence of such bailees; for it is only for their negligence or misfeasance or malfeasance that bailees in general are chargeable. It is therefore to that law that we must have recourse in order to determine upon the liability of all those carriers whose liability depends entirely upon questions of negligence. But as the general law of bailments does not admit the responsibility of ordinary bailees when the loss or injury has occurred without negligence, it furnishes but little guidance in the determination of questions which arise in regard to the responsibility of that, by far the most important class of carriers, who are held to be insurers against all accidents not attributable to the act of God, the public enemy, the owner, the law, or the nature of the goods.

Sec. 10. (§ 10.) Comparative degrees of diligence and negligence.—It being agreed, as it seems, by the universal sense of mankind, that when the question of liability depends solely upon that of negligence, there should be a graduation of the fault according to the circumstances surrounding the bailee, or under which he is charged with the custody of the goods, writers upon this subject, and those who have been called upon to apply the law, have, for convenience of definition, divided

23. See these rules concisely tabulated in Schouler on Bailments, §§ 14-16.

diligence and its corresponding negligence into three kinds or degrees. "There may be," says the author of the Commentaries on Bailments, "a high degree of diligence, a common degree of diligence and a slight degree of diligence; and these, with a view to the business of life, seem all that are necessary to be brought under review. Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns. It may be said to be the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them. . . . High or great diligence is, of course, extraordinary diligence, or that which very prudent persons take of their own concerns; and low or slight diligence is that which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns." And so, he says, there are three corresponding degrees of negligence; "for negligence may be ordinary, less than ordinary, or more than ordinary; ordinary negligence being the want of ordinary diligence, slight negligence the want of great diligence, and gross negligence the want of slight diligence."[24]

Sec. 11. (§ 11.) Utility of this classification.—It is true it has been said that it may be doubted whether the terms slight, ordinary and gross can be usefully applied in practice to distinguish the different degrees of negligence on account of their ambiguous and inexact meaning.[25] But while this may be true, it does not follow that all distinction between the degrees of negligence should be ignored. All negligence is not the same, although it has been said, and perhaps rightly, that where human life is at stake, as in the carriage of passengers by the dangerous agency of steam, it will admit of no degrees.

24. And these degrees of diligence and negligence have their appropriate designations in the Civil Law, as *diligentia, exactissima diligentia, levissima diligentia, lata culpa, levis culpa,* and *levissima culpa.*

25. Steamboat New World *v.* King, 16 How. 474; Wilson *v.* Brett, 11 M. & W. 113; Wyld *v.* Pickford, 8 *id.* 443; Hinton *v.* Dibbin, 2 Q. B. 646.

But the case is different when the subject of the bailment is property, and its propriety in such cases has never been practically denied. The objection is to the terms used to describe the difference in the degrees of the diligence or negligence, and not that the distinction does not exist in fact. Their uncertainty, however, arises from the nature of the subject, and until others are suggested not liable to the objection, we must continue to use them as familiar legal terms and as suggestive of the ideas intended to be conveyed by them with tolerable certainty.[26]

Sec. 12. (§ 12.) Common carrier not usually agent of owner of goods.—Common carriers are sometimes spoken of, in cases which discuss questions as to their liability, as the agents of the owners of the goods. But the relation of principal and agent does not strictly exist between them. The carrier is only the instrument employed by the owner to accomplish his purpose with reference to the goods. He is bound, it is true, to obey the directions of the bailor as to the disposition to be made of them. But after they have been delivered to the carrier, the owner can demand them back only upon the payment of the freight which the carrier would have earned, unless the carrier chooses voluntarily to give them up otherwise; nor can he wilfully and capriciously change his directions as to their destination. The carrier is in no wise under his control, nor can the owner dictate to him what route he shall travel, nor control in any way his movements or his conduct, nor can he be made to respond to others for any injury or damage which may be done by the carrier in the course of his employment by his negligence or torts. It is therefore incorrect to speak of the common carrier as the agent of the owner or bailor of the goods; and so it would be of the private carrier as well, except when such carrier and owner stood towards each other strictly in the relation of master and servant.

Sec. 13. (§ 13.) But may be agent in cases of emergency.—The carrier may, however, under circumstances of great emer-

26. See Schouler on Bailments, §§ 15, 16.

gency acquire a superinduced authority as agent from the very nature and necessity of the case, and his acts under such authority will be completely binding upon the owner of the goods. But this agency arises strictly from the necessity of the case, and if it can be shown not to have existed, all his acts, not relating to the purpose for which the goods have been bailed to him, will be nullities so far as their owner is concerned.[27] But aside from such exceptional cases, he is a stranger to the goods except for the purposes of carriage and preservation according to his contract, and must be regarded as a contractor with the owner and not as his agent or servant.[28]

Sec. 14. (§ 14.) Bailees liable for malfeasance and fraud.— All bailees are liable for malfeasance and fraud under all circumstances. And as the policy of the law forbids all contracts to exonerate parties from liability for their own frauds or tortious acts to the injury of another, no carrier or other bailee will be permitted to provide, even by the most solemn stipulations, for his immunity from their consequences. Private carriers and other ordinary bailees upon whom the law casts no obligation to accept the bailment or to undertake the duty it imposes, but merely an obligation to execute the trust with proper diligence when it has been undertaken, may, however, protect themselves against accountability for negligence or misfeasance, as these consist only of omissions of diligence and not of acts implying moral turpitude or of positive wrong. Being free to engage in the particular service or not as they may please, they may do so upon whatever terms may be agreed upon with the other party short of irresponsibility for unfaithful or dishonest conduct.[29] But common or public carriers upon whom the law imposes the duty of carrying for all who may apply according to their professions, are held more absolutely answerable for their defaults, and, according to the

27. Story on Agency, § 118.
28. Wells *v.* The Nav. Co., 2 Comstock, 204; 4 Selden, 375.
29. See *post*, § 40.

weight of authority in this country, as will hereafter be seen, will not be permitted to provide by contract or in any other manner against being made responsible for the negligence of themselves or their servants.[30]

30. See *post*, § 450.

CHAPTER II.

OF CARRIERS WITHOUT HIRE AND PRIVATE CARRIERS.

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Sec. 15. (§ 15.) In general.—Bailees of goods for carriage, as has been already indicated, are of three kinds, viz.: carriers

without hire or reward, private carriers for hire, and common or public carriers for hire. Neither carriers without reward nor other private carriers are, as to their responsibility, in any wise distinguishable from other ordinary bailees; and, after what has been already said upon the general subject of bailments, but little difficulty will be found in ascertaining or applying the rules by which their responsibility is to be measured. Common carriers, however, in company with innkeepers, are exceptions in many respects in the government of the general law, being bailees upon whom it imposes extraordinary liabilities. The law applicable to the former two classes of carriers may therefore be disposed of, after what has been already said, with a brevity commensurate with its actual importance as compared with that which relates to the common carrier.

I. CARRIERS WITHOUT HIRE.

Sec. 16. (§ 16.) Who deemed to be.—All carriers without hire may be said to be private carriers. It is true that one engaged in the business of a common carrier may carry the goods of another if he chooses without compensation, as a mere matter of gratuity, but in so doing he becomes, as to the particular goods, a private carrier; for the law, as we shall hereafter see, will not subject even the common carrier to the extraordinary responsibilities of that vocation unless he has been paid for the service he undertakes, or has a right to his hire, either by express or implied contract.[1] If, therefore, he has accepted the goods to be carried without charge from motives of friendship or charity, or from any consideration which the law does not regard in the light of pecuniary or valuable compensation, he becomes responsible for their safety only in the character of an ordinary unpaid bailee, known to the law of bailments as a mandatary. But cases of gratuitous carriage most frequently occur in bailments to persons who have never undertaken to carry for others, but who, for an-

1. See *post*, § 61.

other's convenience or accommodation, are induced in the particular instance, when about to commence a journey for purposes of their own, and not for the purpose of carrying the goods, to accept sums of money or articles of value to be carried with them and delivered according to the request of the sender; and such offices of friendship or kindness are usually undertaken with no thought of the responsibility assumed, and without the knowledge that in doing so they make themselves carriers in the eyes of the law. One of the reasons assigned for the infrequency of actions against such bailees is the extreme reluctance on the part of bailors to make their friends the victims of a meritorious, although it may be a negligent, kindness.[2] Still, the authorities furnish numerous instances of suits against gratuitous bailees or mandataries, a number of which have been against carriers without reward.

Sec. 17. (§ 17.) Liability for gross negligence.—The question whether a bailee under such circumstances should be held liable at all, even for the grossest negligence, would seem to be one about which casuists might differ, and was, it seems, never settled in the common law until it was unanimously resolved by the judges in the celebrated case of Coggs *v.* Bernard[3] that such liability was incurred by the gratuitous bailee for carriage. This was the only question for decision in that case, although it was made the occasion for "the elaborate judgment of Lord Hold, which contains the first well-ordered exposition of the English law of bailments."[4] The facts of the case were simply that the defendant had undertaken to remove certain casks of brandy from one cellar to another, but did it so carelessly that one of the casks was burst and the brandy spilled. After judgment for the plaintiff, a motion for its arrest was made, because the declaration had not averred that the defendant had undertaken the service, either in the character of a common porter or carrier or for reward, but, for aught that appeared, had undertaken it gratuitously.

2. Story on Bailments, § 218. Ld. Cas. (9th Am. Ed.), 354.
3. Ld. Raym. 909; 1 Smith's 4. Idem. note.

But the motion was denied, because, even if it had been undertaken without reward, the defendant was liable if he had been grossly negligent in its execution.

Sec. 18. (§ 18.) Undertaking to carry is a sufficient consideration.—And where the plaintiff declared against the defendant for losing a hare which he had undertaken to carry for the plaintiff, on demurrer to the declaration because the plaintiff had not declared upon the custom of the realm, and that, therefore, the defendant must be taken to have been a private person, and because there being no consideration laid, the promise alleged was merely *nudum pactum,* it was determined according to Coggs *v.* Bernard, that though it did not appear that the defendant was to be compensated for his service, and was not, therefore, obliged to undertake it, yet, having voluntarily undertaken it, he became liable for the damage arising from his negligence; and judgment was accordingly given for the plaintiff.[5] So, though an agreement by a railroad company, after carrying goods safely to their destination, to transfer them to another carrier for more convenient delivery to the consignee, is a mere *nudum pactum,* yet, if it enters upon the performance of the agreement, but performs it so negligently that the goods are thereby lost, the company is liable.[6]

Sec. 19. (§ 19.) Carriage not gratuitous where carrier has right to demand compensation.—The test of the liability in such cases is, therefore, the gross negligence of the bailee; and this is to be determined, not by any definite or fixed rule—for as we have seen, this is impossible from the very nature of the subject,—but by the application of the facts of each case, of the knowledge derived from common experience and observation in the affairs of life, which may be called the common sense of mankind. Preliminary, however, to the question of negligence, it must be ascertained whether the bailment was in fact accepted as a mere gratuity, or the service undertaken

5. Hutton *v.* Osborne, 1 Sel. N. P. 420.

6. Melbourne *v.* Railroad, 88 Ala. 443.

under such circumstances as preclude the carrier from the right to set up a claim for compensation. And this is a question which is not always free from difficulty. Thus, where a package of money was delivered for carriage to the clerk of a steamboat, and the proof was that at the time nothing was said about compensation for the carriage, and that it was not usual for boats engaged in that trade to charge for carrying such packages, it was contended on behalf of the defendant that the bailment was a mere mandate and that, therefore, he was bound to only ordinary diligence; but it was held that, no express agreement having been made as to the compensation, the carrier was entitled to it if he chose to demand it, and that he was, therefore, a common carrier of the package for hire and was bound as such, and not as a carrier without hire.[7] So it can make no difference what the intentions of the carrier were, if those intentions have not been communicated to the bailor in such a manner as to induce him to conclude that no compensation will be charged, or so as to influence his conduct in the transaction.[8] And where goods were delivered to the carrier to be sold at the place of his destination, the proceeds to be returned to the owner of the goods by the carrier, it was held that in bringing back the proceeds the carrier was not acting gratuitously, but as a carrier for hire, although he was only to be paid the usual freight upon the goods.[9]

Sec. 20. (§ 20.) Presumption that carriage is gratuitous, when.—These were, however, cases of common carriers, and it is evident that, when the question is whether such carriers, or others usually or even occasionally employed in the business of carrying goods for others for hire, have performed the service gratuitously in a particular instance, the presumption will be that it was done upon their usual terms as to compensation, and not as a mere gratuity, especially if the goods be

7. Kirtland *v.* Montgomery, 1 Swan, 452.

8. Gray *v.* Packet Co., 64 Mo. 47.

9. Kemp *v.* Coughtry, 11 Johns. 107; Harrington *v.* M'Shane, 2 Watts, 443.

of the kind which they are in the habit of carrying. But in bailments to persons not so employed, the presumption would ordinarily be the other way, unless from all the circumstances it appeared that the bailee was to be paid.

Sec. 21. (§ 21.) Not gratuitous where indirect compensation derived.—Sometimes, also, the consideration for the carriage consists, not in a direct compensation to the carrier for the transportation, but in some incidental or consequential advantage which he derives or expects to accrue to him from the carriage; and if this be the inducement to its performance, he will not be allowed to rely upon the defense, when the goods have been lost by his negligence, that he was a mandatary in the carriage, even when the agreement was in terms that nothing should be charged for it. And, accordingly, when by either contract or usage the shipper of grain, or any other commodity which is carried in sacks, has the right to the carriage of the sacks when emptied free of charge, the carrier cannot, if they are lost by his negligence, claim that they were carried gratuitously and thereby escape liability.[10] And, upon the same principle, it has been often held that, when the shipper of goods who pays freight upon them is permitted to travel upon the same conveyance nominally as a free passenger and without paying any distinct consideration for his passage, he is not carried gratuitously, but for a consideration which makes the carrier liable to the same degree as though he had purchased and paid for his ticket.[11] And so it is well settled that, when one has paid to become a passenger upon a public conveyance, the carrier is not a gratuitous bailee of his baggage, but that the price of the passage is also compensation for the carriage of his baggage, and that, as to such baggage, the carrier becomes a common carrier for hire.[12]

Sec. 22. (§ 22.) Question of gross negligence one of fact.—Having ascertained that the carriage is gratuitous, it then be-

10. Pierce *v.* The Railroad, 23 Wis. 387; Aldridge *v.* The Railway, 15 Com. B. N. S. 582.

11. See *post*, § 1021.

12. See *post*, § 1241.

comes necessary to decide whether the carrier has made himself liable for their loss by that degree of negligence which the law characterizes as gross, which is of course a question to be decided by no legal rule, but by the exercise of common reason and by comparison with that conduct which, under the same circumstances, experience and common knowledge would lead us to expect of men of ordinary sense and prudence. Analogous cases can afford but little guidance in forming our conclusions in any particular case, because there are always points of difference in the circumstances, which, however much the cases may resemble each other superficially, would make it unsafe to make the one a test of the other. The question in every case is almost exclusively one of fact, and its determination belongs therefore to the jury and not to the law. Still it may not be inappropriate to refer to some few of those which have been determined in reference to the question of negligence in carriers as mandataries.

Sec. 23. (§ 23.) Not liable for loss by robbery unless negligent.—The carrier without hire will not be held liable for the loss of the property by theft or robbery, provided he has used ordinary prudence. Where a box, belonging to one who intended going upon the vessel but was casually left behind, was broken open by the captain after the vessel had got to sea, upon the suggestion that it might contain contraband goods, and its contents, which were valuable, exposed to the view of the passengers, and instead of being nailed up in the box as before were put into the captain's chest in the cabin and were stolen, Lord Ellenborough instructed the jury that where a person does not carry for hire, he is bound to take proper and prudent care of that which is committed to him, and that when the captain opened the box and intermeddled with its contents, he was bound at least to replace it in its former state of security and to restore all the guards with which it had been before protected, and that having learned the value of the property and exposed it to view, the duty of vigilance was enhanced. He therefore left it to the jury whether the de-

fendant had been guilty of negligence, and they found a verdict for the plaintiff.[13]

Sec. 24. (§ 24.) Degree of negligence which creates liability —Instances—In one case[14] gold dust was sent from Sacramento to San Francisco by a steamer, notwithstanding notice that it would not charge or become responsible for such merchandise. It was, however, accepted and carried on these terms, and when the boat reached its destination late at night, the clerk went up into the city leaving the gold dust in his office, no otherwise secured than by the locking of the door of the office, and in his absence the door was opened and the dust stolen. An action was brought to recover its value from the owners of the steamer as common carriers, but the court thought that there had been no such negligence as to charge them as gratuitous carriers, and that no recovery could be had against them as common carriers, as they had received no compensation for the service.

Sec. 25. (§ 25.) Same subject—Further illustrations.—But in another case the passenger on a steamboat was urged by the clerk to deposit his money in the iron safe of the boat, as there were thieves on board, and the passenger thereupon did give it to him, and it was locked up in the safe with the understanding that no charge would be made for keeping it. When the boat arrived in port an extra guard was put over the office while the clerk went ashore to attend to the business of the boat, after having locked up the safe and office, taking the keys with him. Notwithstanding these precautions, however, the office and safe were both opened and the money of the passenger stolen. In the action for its recovery against the owner of the boat, it seems to have been thought by the court that, though a mandatary, the carrier had not "used a degree of diligence and attention adequate to the performance of the

13. Nelson *v.* Mackintosh, 1 Starkie, 237. See, also, Ouderkirk *v.* Bank, 119 N. Y. 263.

14. Fay *v.* Steamer New World, 1 Cal. 348.

trust," and was therefore liable; and a judgment upon a verdict in favor of the plaintiff was affirmed.[15]

Sec. 26. (§ 26.) Same subject—Further illustrations.—A sum of money was intrusted by one acquaintance to another with the request that upon his return to his home he would deliver it as directed, with which request he promised to comply. Finding afterwards that he would not be able to return as soon as he expected, he turned over the money to a neighbor who was on the eve of starting for the place to which it was to be carried, with the same directions as to its delivery. This was, however, done at a conspicuous place upon a race-track, and was witnessed by a number of persons. In returning to his home the friend to whom the money had been thus turned over had his pocket picked upon the cars, and the money was lost. In an action against the party to whom the money was first delivered by the bailor, it was held that he was liable upon two grounds. In the first place it was said that the unauthorized delivery of the money by the mandatary to another was a conversion which would make him responsible for the loss; and in the second, he was liable on the ground of gross negligence. His conduct, it was said, evinced such a degree of heedless incaution and disregard of common prudence as might justly be considered as amounting to the grossest negligence.[16]

Sec. 27. (§ 27.) Same subject—Other illustrations.—An express company received a package containing a watch which it

15. Jenkins *v.* Motlow, 1 Sneed, 248. The learned judges who decided these cases certainly differed widely in their views as to the character and extent of the negligence necessary to impose a liability upon a gratuitous bailee. The last case seems to be correctly decided, but upon the wrong ground. When the passenger puts his money in the safe of the carrier at his request, to prevent a robbery or for any other purpose, it would seem unquestionable that the carrier at once becomes a common carrier as to the money as he is of the passenger's baggage, the price paid for the passage being also the hire for the carriage of whatever the passenger commits to the custody of the carrier.

16. Colyar *v.* Taylor, 1 Cold. 372.

promised to carry gratuitously, and upon its arrival at destination, there being rumors of an expected raid upon the town by Confederate troops, sent it promptly by one of its messengers to the house of the consignee; but he, finding upon inquiry that the consignee was absent from home, without leaving any notice at the house of the arrival of the package, returned it to the company's office, where it was locked up in its safe. The expected raid was made the next day, after a similar attempt, however, to make the delivery, with the same result, the safe broken open, and the watch taken and lost to the consignee. She sued the company and recovered the value of the watch, the court being of opinion that the defendant had made itself liable by its gross negligence in not leaving notice at the consignee's residence, so that the package could have been sent for by her on the same evening (which would probably have been done by her), and in putting it in the safe, which the company must have known would be the first object of attack in case of a raid such as was expected. "In this perplexing state of facts," said Robertson, C. J., "hard as it may be to impute to the agent culpable or gross negligence, we are so far inclined to that conclusion as to feel at least such an equipoise as not to be able to reverse the judgment of the circuit court on any solid or satisfactory grounds."[17] But where the captain of a ship received a number of watches, for which it was not shown that he was to receive any recompense, and put them into his own chest and in his own cabin upon the ship, and while the ship was anchored in the river she was boarded by robbers, the chest violently taken out of the cabin, where he was sleeping, and broken open and plundered of its contents, it was held that he had taken ordinary care of them, and that, being a carrier without hire, he was not liable for the loss.[18]

17. Adams Ex. Co. *v.* Cressap, 6 Bush. 572. But see Adams Ex. Co. *v.* Darnell, 31 Ind. 20; Howard Ex. Co. *v.* Wile, 64 Penn. St. 201, in which the paid bailee was exonerated upon facts somewhat similar.

18. Pender *v.* Robbins, 6 Jones (Law), 207.

Sec. 28. (§ 28.) Loss of own goods at same time presumptive but not conclusive evidence of diligence.—The fact that the gratuitous bailee has lost his own property together with that of the bailor with which he was intrusted, at the same time and by the same means, will of course be strong presumptive evidence in his favor; but it will not be, by any means, conclusive of the question of honesty or diligence, although the opinion of Lord Holt in Coggs *v.* Bernard seems to have been different. "For if," says he, "the bailee keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty. . . . As suppose the bailee is an idle, drunken, careless fellow, and comes home drunk and leaves all his doors open, and by reason thereof the goods happen to be stolen, and his own, yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own."

Sec. 29. (§ 29.) Same subject—Reckless exposure of own goods.—But it has been said that a man might, in respect to his own property, be willing to encounter extraordinary risks or adventures upon mere gambling speculations, with a view to a particular advantage or from a natural disposition to rashness, which would be wholly unjustifiable in respect to the goods of another placed in his custody. And it has accordingly been held in a number of cases that the mandatary, whether for carriage or for some other purpose, may become liable by reason of his gross negligence in the care of the property bailed to him, although he may have taken the same care of it as of his own.[19]

Sec. 30. (§ 30.) Same subject—Loss of bailor's goods only.—Still, there are authorities of the highest respectability which

19. Doorman *v.* Jenkins, 2 A. & E. 256; Booth *v.* Wilson, 1 B. & Ald. 59; McLean *v.* Rutherford, 8 Mo. 109; Story on Bail. § 64; Tracy *v.* Wood, 3 Mason, 132.

maintain with Lord Holt, that if the bailee be guilty of an act of gross negligence in regard to his own goods as well as those bailed to him, and they are both lost, he cannot be held liable.[20] And whether conclusive or not, the fact that he had at the same time lost his own goods would be a strong argument not only of good faith but of diligence, unless it were shown that he was an "idle, careless or drunken fellow," who took no care of his own goods; and even then, the bailor would perhaps deserve to lose his goods for trusting him. But if he lost the bailor's goods without losing his own, which he was at the same time carrying and which were equally the subjects of theft or robbery, it would, on the other hand, be very strong evidence of bad faith or negligence.[21]

Sec. 31. (§ 31.) No presumption of negligence.—The mandatary is entitled to the benefit of that rule of law by which every man is to be presumed to have done his duty until the contrary is shown. Where, therefore, such a bailee received a letter containing money which he promised to deliver to another, and there was no evidence accounting for its non-delivery, it was held that the most that could be presumed against the bailee was that it had been lost by his gross negligence, and that a tort under such circumstances, by its appropriation to his use, would not be presumed so as to prevent a recovery in an action of *assumpsit*.[22] And in another case against a mandatary for carriage, it was ruled that the plaintiff, in order to recover, must show either an appropriation by the defendant to his own use of the money or property bailed, or that he had demanded it and that the bailee had refused to deliver it or to give any satisfactory account of its loss.[23]

Sec. 32. (§ 32.) Question of gross negligence, how determined.—What is or is not gross negligence in such a bailee is sometimes a mixed question of law and fact, but generally one

20. Story on Bail. § 63; 2 Kent's Com. sec. 40; Knowles *v.* The Railway, 38 Me. 55.

21. Bland *v.* Womack, 2 Murphy, 373.

22. Graves *v.* Ticknor, 6 N. H. 537.

23. Beardslee *v.* Richardson, 11 Wend. 25.

exclusively of the fact to be determined by a jury under all the circumstances.[24] And all the circumstances which may explain the manner of the loss, including the conduct of the bailee in the custody of the property and immediately upon the discovery of its loss, may be considered; and accordingly proof has been admitted that upon such discovery the defendant raised the hue and cry and made assiduous exertions to find the lost property; and though this, it was said, would have been the course of a guilty man, yet it was also one which an innocent man would naturally take, and which, if he did not take, all would condemn him.[25]

Sec. 33. (§ 33.) Same subject—Statements of bailee, when evidence.—So in another case where the party sued had been intrusted with a sum of money which he agreed to carry for accommodation and deliver according to the request of the bailor, evidence was admitted of what he said about the manner and circumstances of the robbery to the person whom he next met upon the road.[26] Statements made by a mandatary in such cases, at the time of demand and refusal to deliver the property, in which he gives an account of the loss by accident or theft with the attending circumstances, are also admissible as part of the *res gestae,* and as such, he is entitled to the benefit of them as evidence in his favor.[27] It would seem, indeed, that for reasons of necessity and to prevent a failure of justice from the absolute impossibility, in many cases, of showing by direct proof the fact and manner of the loss, great latitude has been allowed in admitting evidence of the attendant circumstances; and it was held, before the law removed the disabilities of parties in interest to testify, as it now has generally done, that the mandatary himself was a competent witness to prove a robbery upon the road at night.[28] And no doubt the character of the bailee for prudence and discretion in the man-

24. Beauchamp *v.* Powley, 1 M. & Rob. 38; Storer *v.* Gowen, 18 Me. 174; Tracy *v.* Wood, 3 Mason, 132.

25. Tompkins *v.* Saltmarsh, 14 S. & R. 275.

26. Lampley *v.* Scott, 24 Miss. 528.

27. Beardslee *v.* Richardson, 11 Wend. 25.

28. Lampley *v.* Scott, *supra.*

agement of his business generally may be shown, especially if it be known to the bailor; for the law will not require of the bailee more care and diligence than the bailor had a right to expect from his known habits and character in this regard, and if, being a stranger, he trusts him and he should turn out to be a careless, negligent sort of person, it would be the bailor's own folly.[29]

Sec. 34. (§ 34.) Requisites of declaration against private carrier.—In declaring against the mandatary, it is not necessary to set out any consideration further than the delivery of the goods and the undertaking to carry out the purposes of the bailment. This is indeed the only consideration which can be alleged, and is sufficient in law. For "a bare being trusted with another man's goods must be taken to be a sufficient consideration if the bailee once enter upon the trust and take the goods into his possession." The question of compensation may be important in determining the extent of the rights and obligations of the parties or the class of bailments in which a particular transaction is embraced, but it is not essential to the existence of the contract or to its obligation. Nor need the plaintiff allege the particular character or degree of the negligence upon which he relies for his recovery, but the allegation of negligence generally is sufficient.[30] But the bailee must have actually entered upon the execution of the trust. A mere executory promise to do so will be *nudum pactum*, and will impose no obligation whatever; for the mandatary is not answerable for omitting to do an act for another, and is only responsible when he attempts or undertakes to do it and does it amiss. In other words, he may become liable for a misfeasance but not for a nonfeasance, even though special damages are averred.[31] The goods, therefore, in the case of the

29. Knowles *v.* Railway, 38 Me. 55; Coggs *v.* Bernard, *supra.*

30. McCauley *v.* Davidson, 10 Minn. 418; Nelson *v.* Mackintosh, 1 Starkie, 237; Balfe *v.* West, 22 Eng. L. & Eq. 506; Hutton *v.* Osborne, 1 Sel. N. P. 420; Coggs *v.* Bernard, *supra.*

31. Thorne *v.* Deas, 4 Johns. 84; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Shillibeer *v.* Glyn, 2 M. & W. 143.

carrier without hire, must have been delivered to and accepted by him in order to impose upon him any liability for their safety or for a failure to execute a trust in regard to them.

II. PRIVATE CARRIERS FOR HIRE.

Sec. 35. (§ 35.) Who are.—Private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon.[32] They are not common carriers, because they do not make the carriage of goods for others a business, and do not hold themselves out to the public as ready and willing to carry indifferently for all persons any particular class of goods or goods of any kind whatever; and hence the law does not compel them to accept and carry goods for anybody. Having never professed by their course of business, or in any other manner, to carry for all indifferently, they, unlike common carriers, may refuse at will to carry the goods which may be offered, without incurring any liability whatever, and may carry for one person and at the same time refuse to carry for another.[33] But, being carriers for hire, their reward is regarded as the consideration for the undertaking and the consequent liability; and the trust being for the mutual benefit of the bailor and themselves, they belong to a different class of bailees from mandataries and incur a greater degree of responsibility.

Sec. 36. (§ 36.) Less numerous than formerly.—Before the invention of steam and the wonderful improvement in the means of transportation in modern times, the business of the private carrier for hire was much more important than it is now. Much, perhaps most, of the business of transporting merchandise by land was done by wagoners who did not pro-

32. "A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward." Pennewill *v.* Cullen, 5 Harr. (Del.) 238.

33. Piedmont Mfg. Co. *v.* Railroad, 19 S. C. 353.

fess to be, and were not, in fact, public or common carriers, and consequently the law affecting the rights and responsibilities of such bailees was of very great importance to them as well as to the public, who depended upon them in a very great measure as instruments of commercial intercourse. But the great multiplication of common carriers, whose routes now traverse almost every neighborhood and whose employment affords greater security and facilities in transportation, has almost displaced private carriers and made their business comparatively insignificant. Still, many important business transactions take place through the intervention of private carriers, although the law applicable to the class of bailees to which they belong has become, perhaps, more important in relation to wharfingers, warehousemen and the like, than to private carriers for hire.

Sec. 37. (§ 37.) Degree of diligence required.—The bailment to the private carrier for hire being for the mutual benefit of the parties, the law exacts of him a higher degree of diligence than of the carrier without hire. The measure of his duty is what is known as ordinary diligence, and for the lack of this, he will be held liable.[34] Being required to exercise a greater degree of care and attention than the mandatary, he must, in order to exculpate himself when a loss has occurred, be able to show that he has omitted none of those ordinary precautions for the safety of the property which, according to common experience, men of judgment and prudence would have used under the same circumstances in their care of the

34. In United States *v.* Power, 6 Mont. 271, the court say: "As a private carrier the respondent was bound to use ordinary care,—such care and diligence as a reasonably prudent man would exercise in the conduct of his own business or in the preservation of his own property. Ang. Carr. § 47; Story, Bailm. § 399; 2 Greenl. Ev. § 219; Ames *v.* Belden, 17 Barb. 515; Samms *v.* Stewart, 20 Ohio, 73." The private carrier is liable for ordinary neglect. White *v.* Bascom, 28 Vt. 268; Varble *v.* Bigley, 14 Bush (Ky.), 698; Pennewill *v.* Cullen, 5 Harr. (Del.) 238; Jaminet *v.* Moving Co., 109 Mo. App. 257, 84 S. W. Rep. 128, citing Hutchinson on Carr.; Railway *v.* Glascock & Warfield, 117 Ga. 938, 43 S. E. Rep. 981, citing Hutchinson on Carr.

property, had it been their own; and whether such care was used, under the circumstances, is to be determined in every case as a question of fact by a jury, under instructions from the court as to the particular degree of negligence necessary to impose liability upon the bailee.

Sec. 38. (§ 38.) Same subject—Illustrations.—Illustrations of the application of the law in cases of private carriers may be found in the case of Beck *v.* Evans,[35] where the defendant's wagoner was intrusted with a cask of brandy to be carried for hire. Upon the way, the wagoner was informed that the cask was leaking, but took no steps to ascertain whether the information was correct or to stop the leak. Several hours, however, after he had been told of it, he took the cask out of the wagon and saved what remained of the brandy. It was left to the jury to say whether the loss arose from the negligence of the wagoner in not examining the cask as soon as he was told of its leaky condition; and they having found a verdict for the plaintiff, a rule to set it aside was refused in the Court of King's Bench, on the ground that the defendant had misconducted himself in not performing a duty which, by his servant, he was bound to perform. In a much older case[36] the defendant was declared against, "for that the plaintiff did undertake reasonably to content him for the carriage," in consideration whereof he undertook to carry safely a sum certain of money to an inn and there deliver it to the plaintiff, and that he had not done so; and it was held that the defendant who had accepted the money to be carried was liable, although he was not a common carrier, and although no certain sum had been promised to him as the price of the carriage. In Brind *v.* Dale,[37] the plaintiff hired the carriage of his goods by one of the defendant's carts, and they were lost. Lord Abinger, in his instructions to the jury, said: "I take it that if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good the losses arising from the negligence of his own servants, although he would not be liable for losses by thieves, or by any taking by force, or if

35. 16 East, 244.

36. Rogers *v.* Head, Cro. Jac. 262.

37. 8 Car. & P. 207.

the owner accompanies the goods to take care of them and was himself guilty of negligence; for it is a rule of law that a party cannot recover if his own negligence was as much the cause of the loss as that of the defendant.''[38]

Sec. 39. (§ 39.) Liability for loss by theft or robbery.—Although it is said that the private carrier is not to be held liable for a theft or robbery by which the goods are lost, if the jury should be of the opinion that he has not been guilty of that degree of negligence which is a condition to his liability, a distinction is, it seems, to be drawn between a robbery or taking by force and a theft which is accomplished secretly and by cunning, in this, that in the case of a theft the presumption more readily arises that the carrier was not in the exercise of that diligence which was his duty than in the case of a robbery or forcible capture of the property, especially if it be done openly and not in secret or under the cover of darkness.[39] Indeed, by the civil law, theft ordinarily constitutes no excuse to the bailee for hire, because, it is said, it can scarcely arise without his negligence. It is therefore, in that law, presumptive evidence of negligence of itself, but may be shown to have occurred without the bailee's fault, and then he will be excused.[40] But, by our law, there is nothing in the case of theft, independently of the circumstances under which it was committed, from which we have a right to infer that there must have been negligence. In other words, the mere fact of theft raises no presumption of neglect in the bailee, nor, on the other hand, does it *per se* exempt him from responsibility. But whether there has or has not been a due degree of care must be decided upon all the circumstances of each case.[41]

Sec. 40. (§ 40.) Liability may be regulated by contract.—Negligence being in the nature of an omission simply of that degree of care which, under all the circumstances, is the

38. Cailiff *v.* Danvers, 1 Peake, N. P. 114; Robinson *v.* Dunmore, 2 Bos. & P. 416; Whalley *v.* Wray, 3 Esp. 74; Bowman *v.* Teall, 23 Wend. 306.

39. Hodgson *v.* Fullarton, 4 Taunt. 787; Montagu *v.* Janverin, 3 Taunt. 442.

40. Story on Bail. § 239

41. Story on Bail. § 39.

bailee's duty, without any criminality of purpose, and being, at least when within a certain degree, entirely consistent with good faith, the private carrier may, by contract with his employer, exonerate himself from liability on account of his inattention or want of diligence or skill in the execution of the trust. He may stipulate that he shall in no event be liable except for fraud or its equivalent.[42] So he may by special contract increase his liability beyond that which the law would have otherwise imposed; as where the owner of the goods found fault with some of the appliances of the carrier which he was about to use in moving the goods, and the latter replied, "I will warrant the goods shall go safe," and the owner upon this assurance permitted him to go on with them, and the goods were in fact injured from the very defect of which the owner had complained, it was held that the carrier could be held upon his special undertaking, and that the words used by him to the owner of the goods amounted to a warranty that the goods should go safely.[43] Said the court, per Chambre, J., "the defendant is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty." So in Coggs *v.* Bernard, it was considered, notwithstanding Lord Coke's opinion to the contrary in Southcote's Case,[44] that in a gratuitous bailment, the promise of the defendant to lay the goods down *safely* introduced a special term into his contract which increased his liability. But even an express undertaking by a private carrier to carry goods safely and securely is but an undertaking to carry them safely and securely, free from any negligence of himself or his servants. In other words, it is a mere contract for the observance of due care, and does not insure the safety of the goods against losses by thieves, by robbery or by unavoidable accidents;[45] and does not give rise to that extraordi-

42. Wells *v.* Steam Nav. Co., 2 Coms. 204; Alexander *v.* Green, 3 Hill, 9.

43. Robinson *v.* Dunmore, 2 Bos. & P. 416.

44. 4 Rep. 84.

45. Story on Bail. § 457; Oakley *v.* Packet Co., 11 Exch. 618; Collett *v.* The Railway Co., 16 Q. B. 984. "An express provision in a

nary liability which belongs to the common carrier. The private carrier may, however, by express terms warrant the safety of the goods and thus become liable to the same extent as the common carrier, as every bailee to whom goods are intrusted may undoubtedly for a consideration insure their safety. But an express warranty as to a particular risk will not be extended to a different one; as where the carrier expressly assumes the risk of breakage, he will not be liable for a loss by accidental fire.[46] Nor will an express exclusion of a certain risk be construed as an assumption of all risks not excluded.[47]

contract of bailment for hire to keep the subject of the trust *safely* will not enlarge the common-law liability of the bailee. That is an obligation which the law implies, that is *to keep as safely as an ordinarily prudent man would his own goods.* 2 Blacks. Com. 453. Such a provision will not constitute the bailee an insurer of the safety of the thing bailed; and should it be destroyed by inevitable casualty, or stolen without the fault of the bailee, he will not be responsible. Foster *v.* Essex Bank, 17 Mass. 501. In that case Chief Justice Parker, in remarking upon the agreement to keep the money deposited *safely*, as imposing no greater duty than the exercise of ordinary care, says: 'Anything more than this would amount to an insurance of the goods, which cannot be presumed to be intended, unless there be an express agreement and an adequate consideration therefor.'" Hubbard, J., in Ames *v.* Belden, 17 Barb. (N. Y.) 517. See, also, Jaminet *v.* Moving Co., 109 Mo. App. 257, 84 S. W. Rep. 128, citing Hutchinson on Carr.

46. Scaife *v.* Farrant, L. R. 10 Exc. 358; Ames *v.* Belden, 17 Barb. 513.

47. United States *v.* Power, 6 Mont. 271. In this case a private carrier had undertaken to carry supplies for the government, and the contract contained these words: "All rail to Missouri river; during navigation, on Missouri river. *No river risk on the part of the contractor for unavoidable accidents.* Land haul only when ground is frozen." While certain of the goods were being transported by steamer up the Missouri river, they and the steamer were burned by an accidental fire. It was admitted that the carrier used "the best care and precautions," but it was sought to hold him as an insurer. It was contended by the attorney for the United States that the language used excluding river risks was equivalent to saying "*unavoidable accidents on account of river risks excepted*," and that such unavoidable accidents as arose from *river risks* being alone excepted, all other unavoidable accidents were included; and that thus the respondent was liable for a loss by fire occurring on the

But all the contracts, either to increase or lessen the responsibility of the bailee, must be clear and explicit; for extraordinary liabilities will not be imposed upon him, nor will he be released from his legal and reasonable obligations to the prejudice of the bailor, by mere inference. So his liability may be modified by the previous course of dealing between the parties, or by the usages of the carrier in his business; but customs and usages, to be available for the exoneration of the carrier, must have existed for such a length of time as to have become known and established.[48]

Sec. 41. (§ 41.) Liability for injury to goods subsequently lost by accident.—If the goods are injured by the negligence of the bailee, he will be responsible to the owner to the extent of the damage, notwithstanding a subsequent destruction of them while in the bailee's possession by an accident for which he was not responsible. This was held where goods were deposited in a warehouse for custody, and while there were injured through the carelessness of the warehouseman; but before they were taken away by the owner they were destroyed by a sudden freshet, which caused the water of the river near which the warehouse stood to rise and overflow the room in which the goods were deposited. Every exertion possible had been made by the warehouseman and his servants to save them, and he was therefore clearly not liable for their loss; but it was held that their destruction did not release him from liability for the previous injury which they had sustained through his negligence. The cause of action, it was said, existed before and at the time of their destruction, and there was no principle which would enable the defendant to plead the flood or the consequent destruction of the goods in bar to an action for his previous wrong.[49]

Sec. 42. (§ 42.) Test of private carrier's liability.—The test of the proper performance of his duty by the private car-

river though it was entirely unavoidable. The court, however, held the carrier not liable.

48. Story on Bail. § 543.

49. Powers *v.* Mitchel, 3 Hill, 545; Story on Bail. § 414.

rier for hire is, in almost every case, the extent of the diligence and care which have been exercised by him; and the question of his liability, when the loss has not arisen from his malfeasance, turns upon the inquiry whether or not he has been guilty of negligence, in the omission of care and diligence, to that degree which the law denominates gross or ordinary. But, as we have seen, in dealing with the subject of the liability of the public or common carrier, when it has not been limited by his contract, questions of diligence and negligence are generally impertinent, because they are regarded as insurers of the safety of the goods against all losses except such as arise from the acts of God or of the public enemy. But since the law has been modified, as it has been universally, so that they may limit their liability almost to the same extent as private carriers for hire, the common-law liability is rarely assumed by the more important and extensively employed public carriers; and when they have limited or qualified it, as they are now permitted to do, the question of their liability when the goods have been lost or injured is generally purely one of negligence, as it is in the case of the private carrier. For, when it has been agreed by the parties to the contract of affreightment that the carrier shall not be held liable for losses occurring from certain accidents or causes, it may still be shown that, notwithstanding the loss or injury arose from one of the excepted causes, it would not have occurred but for the negligence of the carrier or his servants, or might have been avoided by the use of proper diligence; which, if successfully proven, will deprive the carrier of all the benefit of his contract in that regard.[50] If, for instance, it be agreed that the carrier shall not be held liable for losses by fire, the construction put upon the contract will be that only fire which was not attributable to his fault or negligence was contemplated or intended, and if it can be shown that the fire which caused the loss originated from his carelessness, or that he could have escaped from it without the loss by the use of diligence, he will be

50. Parrill *v.* Railway Co., 23 Ind. App. 638, 55 N. E. Rep. 1026, citing Hutchinson on Carr.

held responsible to the same extent as if he had been a carrier without any contract whatever as to his liability.

Sec. 43. (§ 43.) How compares with liability of common carriers.—Thus the common carrier in many instances has come to stand upon the same footing as the private carrier for hire, the liability of both very often depending upon questions of diligence and negligence, which in their application to the two classes of carriers mean the same thing, that being diligence or its opposite in the case of private carriers for hire which is so as to the common carrier. A great part of the law which affects the public carrier, therefore, as it is now understood and applied, is equally applicable in cases which arise as to the liability of those who carry privately for reward; and it will be found that most of the questions which can occur in reference to the duties and obligations of the latter can be solved upon the principles which now form perhaps the most important portion of the law relating to common carriers. Much of the law, therefore, which will hereafter be stated in reference to the responsibility of the common carrier for his negligence will be equally applicable to the case of the private carrier for hire.

Sec. 44. (§ 44.) Common carrier cannot become private carrier by contract.—It is, however, by no means to be understood that the common carrier can by his contract or in other mode become, as to the carriage of particular goods, merely a private carrier for hire whilst he is in fact a common carrier of such goods generally. If he could do this, he could, of course, provide by contract against liability for losses occurring from the negligence of himself or his servants, which, as we have seen, it is competent for the private carrier to do. But according to the weight of authority, at least in this country, as we shall hereafter see,[51] common carriers will not be permitted, under any circumstances or in any manner, to protect themselves against the consequences of their own negligence in the carriage of either goods or passengers. They may become the carriers of goods gratuitously, and the law will then

51. See *post*, § 418.

hold them liable only as mandataries; that is, only for losses occurring through gross negligence. But so long as they are compensated for the carriage they are common carriers, contract or no contract.[52] A common carrier may, however, undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry.[53] The relation in such a case is changed from that of a common carrier to that of a private carrier, and where this is the effect of the special arrangement, the carrier is not liable as a common carrier and cannot be proceeded against as such.[54] But it has been held that even though the carrier enters into a special undertaking with a particular shipper to operate each day a special train for such shipper's accommodation, and further agrees that he will not receive for carriage on the train so provided the goods of other shippers which are of like character to those offered by the shipper with whom he has contracted, if he proceeds to accept for transportation thereon other classes of goods tendered by other shippers, his contract will be of no avail in divesting him of his character as a common carrier as to such train, and he may not lawfully refuse for carriage thereon the goods of other shippers, although they be of like kind to those offered by the shipper with whom he has contracted.[55]

52. Davidson *v.* Graham, 2 Ohio St. 140; Railroad Co. *v.* Lockwood, 17 Wall. 357; Hooper *v.* Wells, Fargo & Co., 27 Cal. 11; Christenson *v.* The Am. Ex. Co., 15 Minn. 270; Bank of Kentucky *v.* The Adams Ex. Co., 3 Otto, 180; Kirby *v.* Adams Ex. Co., 2 St. Louis Ct. of App. 369; Parrill *v.* Railway Co., 23 Ind. App. 638, 55 N. E. Rep. 1026, citing Hutchinson on Carr.; Mears *v.* Railroad Co., 75 Conn. 171, 52 Atl. Rep. 610, 96 Am. St. Rep. 192, 56 L. R. A. 884.

53. Railroad Co. *v.* Lockwood, 17 Wall. 357; Honeyman *v.* Railroad Co., 13 Oreg. 352; Central R. Co. *v.* Lampley, 76 Ala. 357; Memphis News Publishing Co. *v.* Railway Co., 110 Tenn. 684, 75 S. W. Rep. 941, 63 L. R. A. 150, citing Hutchinson on Carr.

54. Kimball *v.* Railroad Co., 26 Vt. 249; Honeyman *v.* Railroad Co., *supra;* Railroad Co. *v.* Wallace, 24 U. S. App. 589, 66 Fed. Rep. 506, 30 L. R. A. 161, 14 C. C. A. 257, citing Hutchinson on Carr.

55. Memphis News Publishing Co. *v.* Railway, *supra.*

Sec. 45. (§ 45.) Private carrier cannot become common carrier by contract.—Nor can the private carrier become a common carrier by contract with his employer. He may assume liabilities to his bailor co-extensive with those of the public carrier at common law, and may undertake to carry upon terms which may be agreed upon. He may become an insurer against all possible hazards, and he may say that he will answer for nothing but a loss happening through his own fraud or want of good faith.[56] He may warrant the safety of his charge, and thereby put himself in the "situation" of a common carrier as to the party who has intrusted him with the goods. But still, he does not carry in a public capacity, and does not subject himself to liability to actions for refusal to carry nor for preferences as to those whom he will serve. He is a carrier exactly according to his contract and no further, and may carry when and as he pleases and for whom he pleases, being responsible only to those for whom he undertakes; and in actions against him for loss or damage to the goods, he must be declared against as a private and not as a common carrier.[57]

Sec. 46. (§ 46.) Lien of private carrier on goods.—It seems not to be well settled whether a private carrier for hire has a lien upon the goods in respect to which he performs the service or not. There would seem to be no very satisfactory reason why he should not have the same right to retain the goods until his charges for their carriage are paid, as the warehouseman, the wharfinger or the artisan, who, by his labor and skill, has added to their value.[58] The general rule certainly is that,

56. Wells *v.* Steam Nav. Co., 2 Comstock, 204.

57. Kimball *v.* The Railroad, 26 Vt. 247; Robinson *v.* Dunmore, 2 Bos. & P. 416.

58. "Upon general principles, there seems to be no reason why a private carrier should not have a lien for performing services similar to those rendered by a public carrier." Jones on Liens, § 276. But see Riddle *v.* Railroad Co., 1 Inter. St. Com. Rep. 604.

"Some commentators insist that, on principle, a private carrier should have a lien, but say the decisions hold he has none. * * * We have searched the books and have found no case al-

where the bailee of a chattel has increased its value by his labor, he has a specific lien upon it for his compensation, which means no more than the right to retain it until his charges for the particular service are paid, but not for a general balance of account. Upon similar grounds it has been held that wharfingers and warehousemen who have rendered service in respect to the particular goods for the owner's benefit have such a lien, although their services may have added nothing to their intrinsic value;[59] and it would seem that for the same, and even for stronger reasons, the same right should be conceded to the private carrier for hire. But it seems to have been held otherwise in at least one case in this country.[60]

lowing a lien to a private carrier." Thompson *v.* Storage Co., 97 Mo. App. 135, 70 S. W. Rep. 938, citing Hutchinson on Carr.

59. Story on Bail. 453, 453a.

60. Fuller *v.* Bradley, 25 Penn. St. 120.

CHAPTER III.

WHO IS A COMMON CARRIER.

§ 47. Common carrier defined.
48. Same subject—The essential characteristics.
49. His employment must be public in its nature.
50. Same subject—Exceptional cases—Gordon *v.* Hutchinson.
51. Same subject—The rule in England.
52. Same subject—The rule in Tennessee.
53. Same subject—Further of the Tennessee rule.
54. Same subject—These exceptional cases not elsewhere followed—Illustrations.
55. Same subject—Further illustrations.
56. Same subject—Other cases illustrating general rule.
57. Same subject—The general rule well settled.
58. Same subject—How common carrier compares with innkeeper.
59. Goods must be of kind he professes to carry.
60. Must undertake to carry by customary means and route.
61. Carriage must be for hire.
62. Action must lie for refusal to carry.
63. Regular trips or fixed termini not necessary.
64. Kind of vehicle or vessel and distance immaterial.
§ 65. Hoymen, bargemen, lightermen, canal-boatmen, etc., are common carriers.
66. Ferrymen are common carriers when.
67. Whether ferrymen are common carriers of goods retained in the custody of passenger.
68. Proprietors of land vehicles like stage-coaches, omnibuses, carts, wagons, etc., are common carriers when.
69. Vehicles carrying passengers usually liable as common carriers only as to baggage.
70. Proprietors of local land vehicles are common carriers.
71. Warehousemen, wharfingers and forwarders of freight, when common carriers.
72. Same subject—When liability begins.
73. Water-craft, railways and express companies are chief carriers.
74. Owners of ships are usually common carriers.
75. Owners of steamboats and canal-boats are common carriers.
76. Railroad companies are common carriers.
77. Railroad receivers, trustees, etc., are common carriers.

§ 78. Street railways are common carriers.
79. Sleeping and parlor-car companies not common carriers.
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81. Same subject—Peculiarities of their business.
82. Same subject—Attempts to secure exemption.
83. Same subject—Cannot escape liability by assuming name of "forwarders."
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86. Same subject — Illustrations.
87. Whether railroad transporting cars by contract is common carrier.
88. Same subject—How, when railroad company does not own cars—Circus train.
89. Owners of canal and ferry-boats may show that they are not common carriers.
§ 90. No carrier required to carry every kind of goods.
91. Same subject — Illustrations.
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93. Passenger carriers not common carriers of persons.
94. Postmasters, mail contractors and carriers not common carriers.
95. Telegraph and telephone companies not common carriers.
96. Livery stable keepers are not common carriers.
97. Messenger companies.
98. Log-driving companies not common carriers.
99. Drovers and agisters not common carriers.
100. Owners and managers of passenger elevators.
101. Same subject—Must allow passengers reasonable time to enter or leave car.
102. Same subject—When negligence will be presumed.
103. Bridge, canal and turnpike companies.

Sec. 47. (§ 47.) Common carrier defined.—A common or public carrier is one who undertakes as a business, for hire or reward, to carry from one place to another the goods of all persons who may apply for such carriage, provided the goods be of the kind which he professes to carry, and the person so applying will agree to have them carried upon the lawful terms prescribed by the carrier; and who, if he refuses to carry such goods for those who are willing to comply with his terms, becomes liable to an action by the aggrieved party for such refusal.[1]

1. The definition of a common carrier most usually adopted in this country is that of C. J. Parker, in Dwight *v.* Brewster, 1

Sec. 48. (§ 47a.) Same subject—The essential characteristics.—To bring a person, therefore, within the description of a common carrier the following characteristics must appear:

Pick. 50. He is there defined to be "one who undertakes for hire to transport the goods of such as choose to employ him, from place to place." In Gisbourn *v.* Hurst, 1 Salk. 249, he is said to be "any man undertaking for hire to carry the goods of all persons indifferently." And this is said by C. J. Gibson, in Gordon *v.* Hutchinson, 1 Watts & S. 285, to be "the best definition of a common carrier in its application to the business of this country." The case of Gisbourn *v.* Hurst was one of trover for goods which had been put with the carrier's wagon into a barn and taken as distress for the rent due by the tenant. The carrier had been in the habit of carrying cheese to London and loading back with goods for all persons indifferently, and the court held that he was to be considered a common carrier and in the exercise of a public employment, and the goods therefore privileged from distress.

In Chitty on Carriers, the common carrier is defined to be one who, by the ancient law, held as it were a public office and was bound to the public, and who, to become liable as a common carrier, must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately and hold himself out as ready to engage in the transportation of goods for hire, as a business, and not as a casual occupation.

"Common carriers," says Chancellor Kent, "undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price." 2 Com. 598.

"To bring a person," says Judge Story, "within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*. A common carrier has therefore been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place." Story on Bail. § 495.

These definitions are substantially the same and are adopted and used indifferently. The one given in the text is made somewhat less general by confining the obligation to the carriage of such goods as the carrier professes to carry, and by adding the requirement on the part of the bailor of a compliance or a readiness to comply with the lawful terms prescribed by the carrier, and his liability to an action for a refusal to carry according to the course of his employment. No carrier undertakes to carry all sorts of goods, but only such as are of the

1. He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. 2. He must undertake to carry goods of the kind to which his business is confined. 3. He must undertake to carry by the methods by which his business is conducted and over his established road. 4. The transportation must be for hire. 5. An action must lie against him, if he refuses without sufficient reason to carry such goods for those who are willing to comply with his terms. And this duty or obligation to the public by reason of the public nature of the employment and the increased responsibility imposed upon him by the law upon the grounds of public policy,[2] mainly distinguish the common from the mere private carrier for hire. Each of these characteristics will now be separately considered.

description he professes to carry, and even these he is not compelled to carry unless their owner will comply with his terms, in prescribing which he is allowed considerable latitude, as we shall see. The obligation by law to carry is essential to constitute the vocation of the common carrier, and the liability to an action for a refusal to carry is said by Nesbit, J., in Fish *v.* Chapman, 2 Ga. 349, to be perhaps the safest criterion of the character of the carrier. But a refusal to carry cannot be made the ground for an action without a compliance or offer to comply with such terms of the carrier as he may lawfully impose as the condition of the service. See, also, Varble *v.* Bigley, 14 Bush, 698; Schloss *v.* Wood, 11 Col. 287; Lang *v.* Brady, 73 Conn. 707, 49 Atl. Rep. 199; Railway Co. *v.* Lippman, 110 Ga. 665, 36 S. E. Rep. 202, 50 L. R. A. 673, citing Hutchinson on Carr.; Bassett & Stone *v.* Mining Co., — Ky. —, 88 S. W. Rep. 318.

2. The rule rendering common carriers liable for every loss, except that which is caused by the act of God or the king's enemies, was not a part of the ancient common law. It is a comparatively modern innovation, introduced in consequence of the growing commercial relations of the country, an imperfect police, imperfect protection from the government, and frequent losses by robbery. "The first case in which the principle was recognized and settled is that of Woodliefe and Curtis in the thirty-eighth year of the reign of Elizabeth. And the reason of the rule is not, as stated by Sir Edward Coke, solely or principally because the carrier hath his hire; for other bailees for hire and private carriers for hire are not liable in the same

Sec. 49. (§48.) 1. **His employment must be public in its nature.**—What circumstances will be sufficient to invest the employment of the carrier in particular cases with the character of a public one, and what professions or course of dealing on his part will be considered as enough to constitute him a common carrier instead of a private carrier for hire, is, however, sometimes a question of no little difficulty, and has given rise to considerable diversity of opinion and controversy. The criterion by which it is to be determined whether he belongs to the one class or the other is generally considered to be, whether he has held himself out or has advertised himself in his dealings or course of business with the public as being ready and willing, for hire, to carry particular classes of goods for all those who may desire the transportation of such goods between the places between which he professes in this manner his readiness and willingness to carry. If he has done so, he is of course to be regarded as a common carrier; but if not, he will be treated only as a private carrier for hire.[3]

manner and to the same extent." Per Bockee, Sen., in Van Santvoord *v.* St. John, 6 Hill, 157. But per Holt, C. J., in Lane *v.* Cotton, 1 Salk. 143: "A carrier is liable in respect of his reward, and not of the hundreds being answerable over to him; for the hundred is liable by the statute of Winchester, but he was so at common law; and the reason why robbery did not excuse him was, because it might be by consent and combination carried on in such a manner that no proof could be had of it."

3. In Nugent *v.* Smith, L. R. 1, Common Pleas Div. 19 and 423 (1875), it was considerably discussed in both the common pleas court and in the court of appeal, to which the case was carried. In the former court, Brett, J., after referring to the case of Fish *v.* Chapman, *supra*, as "a powerful and business-like judgment," proceeded to say that "the real test whether a man is a common carrier, whether by land or water, therefore, really is, whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying as a public employment or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried. If he does this, his first responsibility naturally is that he is bound by a promise, implied by

Sec. 50. (§ 49.) Same subject—Exceptional cases—Gordon v. Hutchinson.—This, however, seems not to be the universal test; and some of the cases upon this subject in this country have denied the necessity for any public profession or undertaking, in order to impose upon the carrier the character and the consequent liability of the common carrier, and have held that one who has never assumed the character of a public carrier, and although his contract to carry may be confined to the one particular instance or *pro hac vice*, as it is termed, may assume, thereby, all the responsibility of the common carrier, if he and the class of carriers to which he belongs have been in the occasional habit of accepting the goods of others for transportation for hire. The leading case upon this theory of the responsibility incurred by such carriers is that of Gordon *v.* Hutchinson,[4] which carries the great weight of the authority of C. J. Gibson, who delivered the opinion of the court in favor of that view of the question under the circumstances of difficulty which then existed in the carrying business of this country. In this case, the defendant, who was a farmer, applied at the store of the plaintiff, to be employed to haul a

law, to receive and carry for a reasonable price the goods sent to him upon such an invitation. This responsibility is not one adopted from the Roman law on grounds of policy; it arises according to the general principles which govern all implied promises. And his second responsibility, which arises upon reasons of policy, is that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy; it would be without reason; many other persons hold themselves out to act in their trade or business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers, because when the common law adopted that policy the business of common carriers in England was exercised in a particular manner and subject to particular conditions which called for the adoption of that policy."

See also, Roussel *v.* Aumais, (Canada) Rap. Jud. Que. 18 C. S. 474; Memphis News Publishing Co. *v.* Railway, 110 Tenn. 684, 75 S. W. Rep. 941, 63 L. R. A. 150, citing Hutchinson on Carr.

4. 1 Watts & S. 285.

load of goods for him, from Lewistown to Bellefonte, on his return from the former place, to which he was going with a load of iron. He received an order from the plaintiff and loaded the goods upon his wagon for his return trip. On the way, the head came out of a hogshead of molasses and it was wholly lost. An action was brought against the carrier for its value, and it was held that the farmer, under the circumstances, had made himself in this service a common carrier and was liable as such.

Sec. 51. (§ 50.) Same subject—The rule in England.—It was, however, admitted that the rule was different in England, and the decision was rested entirely upon the difference in the occupations of the people and in the means of transportation. "Rules," it is said, "which have received their form from the business of a people whose occupations are definite, regular and fixed, must be applied with much caution and no little qualification to the business of a people whose occupations are vague, desultory and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current prices, but it will not be thought that he is bound to do so here. In England, the obligation to carry at request, upon the carrier's particular route, is the criterion of the profession; but it is certainly not so with us. . . . The defendant is a farmer, but has occasionally done jobs as a carrier. That, however, is immaterial. He applied for the transportation of these goods as a matter of business, and consequently on the usual conditions. His agency was not sought in consequence of a special confidence reposed in him. There was nothing special in the case. On the contrary, the employment was sought by himself, and there is nothing to show that it was given on terms of diminished responsibility." And the same judge, in the case of Steinman *v.* Wilkins,[5] speaking of the common carrier, observed that in England he was bound by the custom of the realm to carry for all employers, "but it is by no means certain," said he, "that our

5. 7 Watts & S. 466.

ancestors brought the principle with them from the parent country as one suited to their condition in a wilderness. We have no trace of an action for refusing to carry, and it is notorious that the wagoners, who were formerly the carriers between Philadelphia and Pittsburg, frequently refused to load at the current price."

Sec. 52. (§ 51.) Same subject—The rule in Tennessee.—In the case of Moss *v.* Bettis,[6] the facts were that the defendant was a farmer, but "after his crops were laid by," he would run boats for himself or any one else who would employ him. He had built a flat-boat to transport to market a cargo of his own staves, but, at the instance of the plaintiff,[7] abandoned that project and loaded his own and another boat furnished by the plaintiff with plaintiff's lumber, and undertook to carry it by river to market. The boats struck some obstruction in the river and were sunk, occasioning the loss of some of the lumber; and it was held in the action against him by the plaintiff to recover its value, that he was a common carrier in the performance of the service for the plaintiff and was liable as such. The decision was based mainly upon several previous Tennessee cases,[8] which were supposed to sustain the conclusion of the court.

Sec. 53. (§ 52.) Same subject—Further of the Tennessee rule.—But this exception by the Tennessee courts to the common law, which has brought into the family of common carriers a class which does not properly belong there, seems to be confined to carriers by river craft, and to have been first made because the prevalence of this mode of transportation seemed to make it necessary that such carriers should be held to a

6. 4 Heisk. 661.

7. In this case it was said by the court that the liability of the defendant did not in any degree depend upon the fact that the application for his employment in the service had come from the plaintiff. But in Gordon *v.* Hutchinson, *supra*, it will be noticed that great importance seemed to be given to the fact that the defendant had applied for employment to the plaintiff.

8. Craig *v.* Childress, Peck, 270; Johnson *v.* Friar, 4 Yer. 48; Gordon *v.* Buchanan, 5 *id.* 71; Turney *v.* Wilson, 7 *id.* 340.

stricter accountability than mere private carriers. To this extent it has been adhered to as established by precedent, although it may now and then occasion a hardship to the accommodating carrier, even when he is not to blame, as it seems to have done in the case last stated. As to carriers by land, the rule seems to be as at common law.[9] And although the Pennsylvania cases, which extend the exception to carriers by land, are often referred to as authority of weight for rigidly including in the class of common carriers all who legitimately belong there, the opinion expressed in them, that the common-law definition of a common carrier is inapt and inappropriate in a new country, and was not brought to this country with the great body of the law from the mother country, has received judicial sanction in no other state except Tennessee.[10]

9. Walker *v.* Skipwith, Meigs, 502.

10. Several cases in other states are uniformly cited in connection with that of Gordon *v.* Hutchinson as giving support to the position there taken, that one may become a common carrier from a casual employment *pro hac vice*. But they will be found upon examination to add but little if any weight to that view of the question. Powers *v.* Davenport, 7 Blackf. 497, was the case of a wagoner, who undertook to carry goods for the plaintiff from Cincinnati to Crawfordsville, under a written contract to deliver them in good order and condition. It was proven that the defendant, in order to visit his house, deviated from the direct and customary route, and while so doing a bridge over which he was passing broke down and the goods were thereby injured. He was sued upon his special undertaking, and the court expressly declined to consider the question whether he was liable as a common carrier, saying that the question whether he was carrying the goods in that capacity was immaterial. But he was held liable upon his special undertaking. He would have been unquestionably liable aside from his contract, even as a private carrier for hire. He had no legal excuse for the deviation, and when he made it for his own convenience or pleasure, he of course took upon himself the risk of the consequences from any accident which would not have occurred upon the direct route which it was a plain violation of his duty not to keep, and in not keeping it he was guilty of at least ordinary negligence. In McClure *v.* Richardson, Rice, 215, defendant was sued as the owner of a boat of which one Howzer was the patroon or captain, and on which the defendant used to carry his own cotton to market, occasionally, however, taking cotton for his neighbors when he did

Sec. 54. (§ 53.) Same subject—These exceptional cases not elsewhere followed—Illustrations.—Elsewhere no such exception has been made, and the carrier has been subjected to the extraordinary liability of the common carrier only when it has

not have a load of his own, for which he charged them. While the boat was on its way, having on board the cotton of the defendant and of several of his neighbors, the plaintiff applied to the patroon to take some of his on board, which the latter agreed to do for an agreed freight. A part of this cotton was, while upon the boat, destroyed by fire, and the plaintiff sued to recover his loss from the owner of the boat. The defense was that the patroon had no authority to take on board the plaintiff's cotton, or to make the contract to carry it. But it was held that under all the circumstances he did have such authority, and that the defendant was liable for the cotton as a common carrier. "If the defendant," said the court, "had previously employed his boat for his own purposes exclusively, it could not have been fairly inferred that the agent could do what his employer never had done; but his employer had used his boat in some measure for the community in which he lived, and, from his course of dealing with it, had held himself out as a common carrier." The liability as common carrier was thus rested expressly upon the ground of the holding out to the community. But the case seems to lack one necessary element to complete the character of common carrier, and that is, the obligation to carry for those who might apply and the liability to an action for a refusal, and in this respect it agrees with Gordon *v.* Hutchinson.

In Moses *v.* Norris, 4 N. H. 304, decided in 1828, the action was against the defendant for the loss of some bars of iron which he had undertaken to carry from Portsmouth to Exeter in a sled, which on the way broke down. Nothing is said in the report of the case about the nature of the employment of the defendant further than that he was a carrier for hire; whether he was a carrier for all who applied, or held himself out as such or not, does not appear. But he was held liable, Richardson, C. J., saying: "It seems to be well settled that all persons carrying goods for hire come under the denomination of common carriers." But an assertion so broad, if understood without qualification, is wholly untenable according to all the authorities, even those which are cited for it in the case (Buller's N. P. 70; Rogers *v.* Head, Cro. J. 262; Dale *v.* Hall, 1 Wil. 281; 1 Sel. N. P. 240); and considering that it was said before the law upon the subject had received any investigation in this country, it is entitled to but little weight. In Chevallier *v.* Straham, 2 Tex. 115, the defendant's principal business was farming, but at a certain season of the year known as the hauling season, he engaged in the carrying business, and ran his wagon wherever he

been shown that by his professions, or previous course of business, he has held himself out as such a carrier, or when it must be so presumed from the very nature of his employment.

Thus, in Samms *v.* Stewart,[11] a case was presented which was very similar to that of Gordon *v.* Hutchinson. In this case it appeared that Samms was a farmer, living at or near New Hope, in the vicinity of Cincinnati, and had been in the habit for many years of carrying marketing from New Hope to Cincinnati, and that, when about going to the latter city with marketing, he frequently asked the merchants of New Hope for return loads of goods. On one such occasion he received from Stewart & McKibben a box of goods to be carried from Cincinnati to New Hope in his wagon. The box was stolen from his wagon on the way, and the action was brought to charge him with the value of the goods as a common carrier. The court below, relying on Gordon *v.* Hutchinson, held him so liable, but the supreme court reversed the judgment, holding that case to be opposed to the current of authorities. "We see no reason," said the court, "why the law applicable to a common carrier should be applied to a farmer who makes a personal application to a merchant for a load of goods on his return trip from market. The merchant has it in his power to make such special bargain as he chooses as to what shall be the liability of the farmer in case the goods are lost. The farmer has assumed no character to the community entitling him to peculiar confidence, and the merchant is left, as in ordinary cases, to an inquiry as to his character and qualifications. Nor do we suppose it would make any difference how

could procure employment in that way. Under these circumstances, he was held liable as a common carrier, the court saying that there were no grounds in reason why the occasional carrier, who periodically, in every recurring year, abandons his other pursuits and assumes that of transporting goods for the public, should be exempted from any of the risks incurred by those who make the carrying business their constant or principal occupation. The only question, therefore, in this case, was, whether, to constitute one a common carrier, he should hold himself out as such continuously, and whether he might not become one by so holding himself out during a certain period of the year.

11. 20 Ohio, 69.

many applications of this kind had been made by the party thus carrying, or to how many different persons they may have been made, they would still remain so many special and individual transactions."

So in Fish *v.* Clark,[12] the facts were very nearly the same as in the foregoing case of Moss *v.* Bettis. The defendants, one of whom was a manufacturer of staves and the other a cooper, owned a boat in common for the purpose of transporting their staves and barrels to market. Wanting employment for their boat, one of them applied to the plaintiffs for a load of freight to New York, which was given them. Defendants furnished hands, and one of them commanded the boat, plaintiffs only furnishing the freight. On the trip, by a breakage in the canal, and without fault or negligence of the defendants, the boat was sunk. It was proven that on one or more occasions during the previous year the defendants had carried for the plaintiffs in the same way. The question was, whether, under these circumstances, the defendants were common carriers, and it was held that they were not. "According to all the authorities," say the court, "it is an essential characteristic of the common carrier that he hold himself out as such to the world; that he undertake generally, and for all persons indifferently, to carry goods and deliver them for hire, and that his public profession of his employment be such that, if he refuse without some just ground to carry goods for any one in the course of his employment, and for a reasonable and customary price, he is liable to an action." By this test it seemed clear that the defendants had not performed the service for the plaintiffs in the character of common carriers; and it was further considered that the fact that the defendants had applied for the employment could not affect the question of their liability or the capacity in which they had been employed.

Sec. 55. (§ 53a.) Same subject—Further illustrations.—So in Steele *v.* McTyer,[13] it appeared that a custom existed in

12. 2 Lans. 176; s. c. 49 N. Y. 122.

13. 31 Ala. 667. A boat used by its owners and

Alabama to build flat boats, load them with cotton of any person having cotton for transportation, and of then running the boats down the river to Mobile, where the boats, when unloaded, were sold for wood or lumber, without making any further trips. In accordance with this custom, defendants had had a flat boat constructed, and, after taking on board the cotton of the plaintiff and three other persons at their respective landings, had started down the river to Mobile. On the way the boat was sunk, and the cotton of the plaintiff was lost, and an action was brought to charge the defendants as common carriers. "If the appellants (the defendants) built or procured a flat boat," said Walker, J., "with which to carry cotton down the Cahaba river and thence to Mobile, though only for a single trip, and held themselves out as ready and willing to carry cotton on their boat for the people generally who wished to send their cotton to Mobile, then they would be common carriers, and those who placed cotton upon the boat could not be affected by any private instructions which might have been given to the master of the boat as to the point on the river above which he was to take on no cotton. On the contrary, if the appellants did not hold themselves out as ready and willing to carry cotton for the public generally, to the extent of a proper load of the boat, or, in other words, did not constitute themselves the servants of the public in that business, but only proposed to take the cotton of some particular persons with whom engagements were made, they were not common carriers. If the appellants, having engaged a part of the loading for the boat, held themselves out as ready to carry for any person or persons to the extent of the remaining capacity of the boat, then they would be liable as common carriers to such persons as availed themselves of such offer of their services to the public generally as carriers. These questions, under the proof, should have been left to the jury.

managers for their own purposes and those of others who *agree* to pay certain rates for the transportation of their goods from one point to another, and which is not shown to have been held out as a common carrier, cannot be declared to be such at the instance

. . . The evidence that the defendants had been in former years engaged for the public generally in the transportation of cotton to Mobile on flat boats, would be proper for the consideration of the jury in determining the question whether they were common carriers; but it would not necessarily be conclusive. It might be that, notwithstanding they had previously acted as common carriers, they had abandoned the service of the public, and were simply engaged in the execution of special contracts. To constitute them common carriers, they must be engaged in the service of the public."

Sec. 56. (§ 54.) Same subject—Other cases illustrating general rule.—The question of his liability had been previously determined in favor of the carrier by the New York court and upon the same ground in Allen *v.* Sackrider,[14] in which the facts were similar. The defendants being the owners of a sloop, but not engaged with it in the business of carrying goods generally, and not holding themselves out to the world as carriers generally, were applied to by the plaintiffs to make a trip for them and bring back goods, as they had done on a previous occasion for them. On her return the sloop was driven ashore and her cargo injured, for which the plaintiffs sued. The liability of the defendants turned entirely on the question whether they were common carriers in the undertaking for the plaintiffs, and it was held that such casual use of the sloop did not make its owner a common carrier.

Sec. 57. (§ 55.) Same subject—The general rule well settled.—These cases undoubtedly state the law as it is settled in England and generally understood in this country; and it would seem clear that no one should be treated as a common carrier unless he has in some way held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wished to

of such agreeing parties. Flautt *v.* Lashley, 36 La. Ann. 106.

A vessel chartered to transport a specific cargo only is not a common carrier. The Dan, 40 Fed. Rep. 691; Sumner *v.* Caswell, 20 Fed. Rep. 249.

14. 37 N. Y. 341. See, also, Fish *v.* Clark, 49 N. Y. 122.

employ him in the particular kind of service which he thus proposes to undertake. Otherwise he does not come within the description, nor can he be subjected to the liability of the common carrier when the goods have been lost without negligence.[15]

15. Story on Bail. 495; 2 Kent's Com. 598; Satterlee *v.* Groat, 1 Wend. 272; Citizens' Bank *v.* Nantucket S. B. Co., 2 Story, 17; Dwight *v.* Brewster, 1 Pick. 50; Forward *v.* Pittard, 1 Term. 27; Palmer *v.* G. J. Railway, 4 M. & W. 749; Riley *v.* Horne, 5 Bing. 217; Lane *v.* Cotton, 1 Ld. Raym. 646; Crouch *v.* Railway Co., 14 Com. B. 255; Coggs *v.* Bernard, 1 Smith's Lead. Cas. 283 and notes.

It would be useless to multiply the citation of authorities upon a proposition which has become one of the elementary principles of the law in reference to carriers. Only a few, therefore, of the cases upon the subject, which may be considered leading, are referred to. But as the opinion of Nesbit, J., in Fish *v.* Chapman, 2 Ga. 353, expresses the law upon the subject with great force, and, as generally admitted, with accuracy, we append a portion of it. This, like the Pennsylvania case of Gordon *v.* Hutchinson, *ante*, was the case of the employment of a farmer who, never having held himself out as a carrier generally, was employed by the plaintiff to carry goods, which, in crossing a stream upon the way, were injured by the upsetting of the wagon. After giving the definitions of a common carrier from Kent's Com. and Story on Bail. and stating that he was obliged to receive and carry for all who offered their goods, and could not either by contract or notice lessen the liability which the law imposes upon him, the learned judge proceeded: "It is from these definitions and the two propositions stated, that we are to determine what constitutes a person a common carrier. I infer, then, that the business must be habitual and not casual. An occasional undertaking to carry goods will not make a person a common carrier; if it did, then it is hard to determine who, in a planting and commercial community like ours, is not one. There are few planters in our state owning a wagon and team who do not occasionally contract to carry goods. It would be contrary to reason and excessively burdensome, nay, enormously oppressive, to subject a man to the responsibilities of a common carrier who might, once a year or oftener at long intervals, contract to haul goods from one point in the state to another. Such a rule would be exceedingly inconvenient to the whole community; for if established, it might become difficult in certain districts of our state to procure transportation.

"The undertaking must be general and for all people indifferently. The undertaking may be evidenced by the carrier's own notice or practically by a series of acts, by his known habitual continuance in this line of business.

Sec. 58. (§ 56.) Same subject—How common carrier compares with innkeeper.—There is the same difference between the common or public carrier for hire as between the innkeeper

He must thus assume to be the servant of the public; he must undertake for all people. A special undertaking for one man does not make a wagoner or anybody else a common carrier. I am very well aware of the importance of holding wagoners in this country to a rigid accountability; they are from necessity greatly trusted; valuable interests are committed to them, and they are not always of the most careful, sober and responsible class of our citizens. Still the necessity of an inflexible adherence to general rules we cannot and wish not to escape from. To guard this point, therefore, we say that he who follows wagoning for a livelihood, or he who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place, whether for a year, a season or less time, is a common carrier and subject to all his liabilities.

"One of the obligations of a common carrier, as we have seen, is to carry the goods of any person offering to pay his hire; with certain specific limitations, this is the rule. If he refuse to carry, he is liable to be sued and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character. By this test, was Mr. Fish a common carrier? There is no evidence to make him one but his contract with Chapman & Ross. Suppose, after executing this contract, another application had been made to him to carry goods, which he refused, could he be made liable in damages for such refusal upon this evidence? Clearly not. There is not a case in the books but one to which I shall presently advert, which would make him liable upon proof of a single carrying operation. . . . In conflict with these views, it has been held in Pennsylvania that 'a wagoner who carries goods for hire is a common carrier, whether transportation be his principal and direct business or an occasional incidental employment.' Gibson, C. J., in Gordon *v.* Hutchinson, 1 W. & S. 285. This decision no doubt contemplates an undertaking to carry generally without a special contract, and does not deny to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be but little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient." And in Harrison *v.* Roy, 39 Miss. 396, it was said that while, under the circumstances of that case, the wagoner had made himself liable as a common carrier, if the transaction had been a mere isolated undertaking, such as he had not been in the habit of engaging in, and which was foreign to his regular and usual business, there would have been force in the position that he could not be so held.

and the man who occasionally, and not as a public business, entertains travelers; and the test for determining whether he who carries is to be regarded as a common carrier is the same as that which must be applied when the question is whether he who entertains travelers or strangers is an innkeeper. There should be the same necessity in both cases for a public profession, or a course of dealing which will be equivalent to a profession of being engaged in the business for the accommodation of the general public, and there must be the same obligation to receive and become accountable for the goods of all who apply; and to make one liable as an innkeeper there can be no question, upon the authorities, but that there must be such an assumption of the character or "public holding out" in the business as will put the party under legal compulsion to entertain the traveling public. "To render a person liable as a common innkeeper," says the court in Lyon *v.* Smith,[16] "it is not sufficient to show that he occasionally entertains travelers. . . . The person who occasionally entertains others for a reasonable compensation is no more subject to the extraordinary responsibility of an innkeeper than is he liable as a common carrier who, in certain special cases, carries the property of others from one place to another for hire."

Sec. 59. (§ 56a.) 2. Goods must be of kind he professes to carry.—In the second place, in order to charge one as a common carrier of goods, the goods in question must be of the kind to which his business is confined. No carrier undertakes to carry all kinds of goods, but only such as are of the description which he professes to carry. A common carrier is, therefore, not liable as such where, by special engagement or as a matter of accommodation merely, he undertakes to carry a class of goods which it is not his business to carry.[17] Illustrations of this rule will be given in a subsequent section.[18]

16. 1 Iowa,* 184.

17. See *ante*, § 44; Kimball *v.* Railroad, 26 Vt. 249; Honeyman *v.* Railroad Company, 13 Oreg. 352; Central Railroad, etc., Co. *v.* Lampley, 76 Ala. 357; Railroad *v.* Wallace, 24 U. S. App. 589, 14 C. C. A. 257, 66 Fed. 506, 30 L. R. A. 161, citing Hutchinson on Carr.

18. See *post*, §§ 90, 91.

Sec. 60. (§ 56b.) 3. Must undertake to carry by customary means and route.—Common carriers of goods do not undertake to carry by any or all means, but only by those means and methods[19] and over the route[20] to which their business is confined. Thus common carriers by wagon cannot be required to carry by railroad, nor can carriers by water be required to carry by land, nor can a carrier be required to carry to a point or by a route to which his business does not extend. And even if a carrier should, in a particular instance, undertake by a special contract to carry goods by unusual and exceptional methods or routes, his liability would be based upon his contract and not by the ordinary rules governing common carriers.[21]

Sec. 61. (§ 57.) 4. Carriage must be for hire.—In the fourth place, compensation to the carrier in some form, either by the payment of his price, or a promise, express or implied, to pay it,[22] or a payment or promise to pay for something which

19. Coup *v.* Wabash Ry. Co., 56 Mich. 111.

20. Pitlock *v.* Wells, Fargo & Co., 109 Mass. 452; Pittsburg, etc., R. Co. *v.* Morton, 61 Ind. 539.

21. Railroad Co. *v.* Wallace, 24 U. S. App. 589, 14 C. C. A. 257, 66 Fed. 506, 30 L. R. A. 161, citing Hutchinson on Carr.

22. In Citizens' Bank *v.* The Nantucket S. B. Co., 2 Story, 16, Judge Story disposes of the question of compensation to the carrier in the following language: "In the next place, I take it to be exceedingly clear that no person is a common carrier in the sense of the law who is not a carrier for hire; that is, who does not receive or is not entitled to receive any recompense for his services. The known definition of a common carrier in all our books fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but something is bestowed as a gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier, but he is a mere mandatory or gratuitous bailee, and of course his rights, duties and liabilities are of a very different nature and character from those of a common carrier. In the present case, therefore, it is an important inquiry whether, in point of fact, the respondents were common carriers of money and bank notes and checks for hire or recompense or not. I agree that it is not necessary that the compensation should be a fixed sum or known as freight, for it will be sufficient if a hire or recompense is to be paid for the service in the nature

will include the carriage as an incident thereto, is essential to constitute him a common carrier; for if, as we have seen,[23] he receives no hire, he is merely a gratuitous bailee or mandatary and can be held liable only for gross negligence.[24] But, though he has received no direct compensation for the particular service and would not be entitled to recover for it *eo nomine*, and even though by his express contract he was to receive nothing for it, yet if, when all the circumstances are taken together, it appears that the compensation was paid or promised for the entire service, he will not be considered as a gratuitous bailee as to any part of it. As where grain was shipped in sacks, and the agreement was that the carrier was not to charge for returning the empty sacks, it was held that he was not a gratuitous carrier in bringing back the sacks, the compensation paid nominally for the carriage of the grain covering also the service as to the empty sacks.[25] So where

of a *quantum meruit*, to or for the benefit of the company. And I further agree that it is by no means necessary that, if hire or freight is to be paid, the goods or merchandise or money or other property should be entered upon any freight list, or the contract be verified by any written memorandum. But the existence or non-existence of such circumstances may nevertheless be important in ascertaining what the true understanding of the parties is as to the character of the bailment." And see to the same purport, Kirtland *v.* Montgomery, 1 Swan, 452.

Where an individual or corporation constructs a railroad wholly upon its own land, and for the conduct of its own private business, the fact that it occasionally permits persons to ride gratuitously upon its cars does not constitute it a carrier of passengers. Wade *v.* Lutcher, etc., Co., 41 U. S. App. 45, 20 C. C. A. 515, 74 Fed. 517, 33 L. R. A. 255, citing Hutchinson on Carr.

23. *Ante*, § 16.

24. "To originate the exceptional liability of the common carrier," says Clopton, J., "although founded on reasons of public policy, and to create the relation, there must exist privity of contract, express or implied, and a title to compensation for the services. Public policy operates on those only who transport for reward or hire. Where there is no right to remuneration, the party who carries incurs no liability other than that of a gratuitous bailee." In Central Railroad, etc., Co. *v.* Lampley, 76 Ala. 357, citing Citizens' Bank *v.* Nantucket S. B. Co., 2 Story, 16; Knox *v.* Rives, 14 Ala. 249.

25. Pierce *v.* The Railroad, 23 Wis. 387; Aldridge *v.* The Railway, 15 Com. B. N. S. 582.

the carrier was to sell the goods and return the proceeds, the freight paid upon the goods would also be regarded as compensation for bringing back the proceeds.[26]

Sec. 62. (§ 57a.) 5. Action must lie for refusal to carry.—Lastly, the party must be under such a legal obligation to carry that an action will lie against him for a refusal without sufficient excuse.[27] "The true test of the character of a party, as to the fact whether he is a common carrier or not," says Chief Justice Simpson, "is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry, or must he carry for all? If it is his legal duty to carry for all alike who comply with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and in all the states, upon common carriers. If, on the contrary, he may carry or not as he deems best, he is but a private individual, and is invested, like all other private persons, with the right to make his own contracts, and when made to stand upon them."[28] "One of the obligations of a common carrier," says Nisbet, J., "is to carry the goods of any person offering to pay his hire; with certain specific limitations this is the rule. If he refuse to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and *this is perhaps the safest test of his character.*"[29]

Sec. 63. (§ 57b.) Regular trips or fixed termini not necessary.—It is not necessary, where the other elements exist, that the carrier should make regular trips[30] or travel only between fixed termini.[31]

26. Kemp *v.* Coughtry, 11 Johns. 107; Harrington *v.* McShane, 2 Watts, 443; Emery *v.* Hersey, 4 Greenl. 407; Mosely *v.* Lord, 2 Conn. 389.

27. Fish *v.* Chapman, 2 Ga. 349; Nugent *v.* Smith, L. R. 1 C. P. Div. 19, 423; Piedmont Manuf. Co. *v.* The Railroad, 19 S. C. 353.

28. In Piedmont Manfg. Co. *v.* Railroad Co., *supra.*

29. In Fish *v.* Chapman, *supra.* See also, Lanning *v.* Railroad Co., 1 N. J. Law J., 21.

30. Pennewill *v.* Cullen, 5 Harr. 238.

31. Liver Alkali Co. *v.* Johnson, L. R. 7 Ex. 267; 9 *id.* 338.

Sec. 64. (§ 58.) Kind of vessel or vehicle and distance immaterial.—So it is wholly immaterial in what kind of vessel or vehicle or for what distance the carrying is done. Thus—

Sec. 65. (§ 58a.) Hoymen, bargemen, lightermen, canal-boatmen, etc., are common carriers.—Hoymen, bargemen, lightermen, and, in short, boatmen of every description upon rivers, canals, lakes or the sea, come within the denomination of common carriers if they engage in the business of carrying or transporting goods indifferently for all who may employ them.[32]

Sec. 66. (§ 58b.) Ferrymen are common carriers when.—So ferrymen are common carriers as to the baggage of their passengers and as to all goods or chattels which they make it their business to transport; or if they hold themselves out to the public as engaged in the business of ferrying goods or property, either generally or of a particular kind.[33] But the nature of a ferry depends in a great measure upon the character of the road of which it forms a part. If the road is a footpath, the ferry may be for foot passengers only. If it be an ordinary highroad, the ferry will be not merely for foot passengers and their baggage, but for horses and carriages

32. Canal-boatmen are common carriers under ordinary circumstances. Bowman *v.* Teall, 23 Wend. 309; Parsons *v.* Hardy, 14 Wend. 215; De Mott *v.* Laraway, 14 Wend. 225; Humphreys *v.* Reed, 6 Whart. 435; Fuller *v.* Bradley, 25 Penn. St. 120. But not where they are not public carriers. Fish *v.* Clark, 49 N. Y. 122; Beckwith *v.* Frisbie, 32 Vt. 559; Spann *v.* Transportation Co., 11 Misc. Rep. 680, 33 N. Y. Supp. 566.

33. Lewis *v.* Smith, 107 Mass. 334; White *v.* Winnissimmet, 7 Cush. 156; Sanders *v.* Young, 1 Head, 219; Fisher *v.* Clisbee, 12 Ill. 344; Wilson *v.* Hamilton, 4 Ohio St. 722; Harvey *v.* Rose, 26 Ark. 3; Powell *v.* Mills, 37 Miss. 691; Griffith *v.* Cave, 22 Cal. 535; Hall *v.* Renfro, 3 Met. (Ky.) 51; Self *v.* Dunn, 42 Ga. 528; Cook *v.* Gourdin, 2 Nott & McC. 19; Rutherford *v.* McGowen, 1 *id.* 17; May *v.* Hanson, 5 Cal. 360; Whitmore *v.* Bowman, 4 Greene (Iowa), 148; Babcock *v.* Herbert, 3 Ala. 392; Miller *v.* Pendleton, 8 Gray, 547; Claypool *v.* McAllister, 20 Ill. 504; Albright *v.* Penn, 14 Tex. 290; Smith *v.* Seward, 3 Barr, 342; Pomeroy *v.* Donaldson, 5 Mo. 36; Cohen *v.* Hume, 1 McCord, 439; Littlejohn *v.* Jones, 2 McMullan, 365; Clark *v.* Union Ferry Co., 35 N. Y. 485; Le Barron *v.* Ferry Co., 11 Allen, 312.

and all goods which may be carried upon the road.[34] And one who keeps a ferry, not for public accommodation, but simply for the convenience of the customers of his mill, and charges no ferriage, is not a common carrier, no matter what advantage he may derive from it incidentally;[35] and even though compensation may sometimes be made, not as a charge, but as a gratuity.[36]

Sec. 67. Whether ferrymen are common carriers of goods retained in the custody of passenger.—While the cases uniformly concede that a ferryman who holds himself out as being ready and willing to carry or transport for hire the goods of all who may wish to employ him is, as to the goods in his custody, a common carrier, the courts have differed in their views as to the extent of the liability assumed in those cases where the owner of the goods accompanies them and continues to retain them under his control. On the one hand it is held that as soon as the goods are placed upon the ferryman's vehicle for the purpose of being transported, they are in the custody of the ferryman as a common carrier, and that the fact that the owner retains them under his control merely places him in the position of an agent of the ferryman.[37] On the other hand it is said that such a rule rests upon no just principle, and that in such cases the ferryman does not assume toward the goods the responsibility of a common car-

34. Willoughby *v.* Horridge, 16 Eng. L. & Eq. 437.

35. Self *v.* Dunn, 42 Ga. 528.

36. Littlejohn *v.* Jones, 2 McMullan, 366.

37. While none of the cases deny that a ferryman who carries for hire is a common carrier, there is considerable diversity of opinion as to the extent of the liability assumed by him. In some of the cases it is held that as soon as the passenger comes with his property upon the ferryman's boat, the property which he brings with him, whether inanimate or live stock, is put *ipso facto* absolutely into the custody of the ferryman, and if the owner continues his control over it to any extent, he does so as the agent of the ferryman, and the absolute responsibility of the ferryman as a common carrier at once commences. Fisher *v.* Clisbee, 12 Ill. 344; Powell *v.* Mills, 37 Miss. 691; Wilson *v.* Hamilton, 4 Ohio St. 722.

In others it is said that the presumption is, that the property

rier.[38] The latter rule would seem to be more in accord with the principles which govern the carrier's common law liability. In order to impose upon one who undertakes the transportation of goods the stringent responsibility of a common carrier,

goes into the ferryman's custody as a common carrier, and that the burden is upon him of showing that he did not have such control over it as invested him with the character of common carrier in respect to it, and that a *prima facie* case is established against him if it be shown that the ferry was a public one and that the property was put upon the boat.

38. Wyckoff *v.* Ferry Co., 52 N. Y. 32. In this case the owner of a horse and wagon drove upon a ferryboat, and, remaining in the wagon, kept control of the vehicle and horse until the accident happened. The law as to the liability of the ferryman as a common carrier was thus qualified by Allen, J.: "A ferryman," said he, "is not a common carrier of the property retained by a passenger in his own custody and under his own control, and liable as such for all losses and injuries except those caused by the act of God or the public enemies. The cases which go the length of holding that the ferryman is chargeable as a common carrier for the absolute safety of property thus carried, and that the owner, in taking care of the property during the passage of the boat, may be regarded as agent of the ferryman, do not stand upon any just principle, and are not within the reasons of public policy upon which the extreme liability of common carriers rests. . . . While ferrymen, by reason of the nature of the franchise they exercise and the character of the services they render to the public, are held to extreme diligence and care and to a stringent liability for any neglect or omission of duty, they do not assume all the responsibilities of common carriers. Property carried upon a ferryboat in the custody and control of the owner, a passenger, is not at the sole risk of either the ferryman or the owner. If lost or damaged by the act or neglect of the ferryman, he must respond to the owner. The ordinary rules governing in actions for negligence apply; and a plaintiff cannot recover if he is guilty of negligence on his part, contributing to the loss. The liability of a common carrier, in all its extent, only attaches when there is an actual bailment, and the party sought to be charged has the exclusive custody and control of property for carriage. A ferryman does not undertake absolutely for the safety of goods carried with and under the control of the owner; but he does undertake for their safety as against the defects and insufficiencies of his boat and other appliances for the performance of the service, and for the neglect or want of skill of himself and his servants. At the same time, the owner of the property, retaining the custody of it, is bound to use ordinary care and diligence to prevent loss or injury." Fisher

it is essential, as will be seen in a later section,[39] that he have exclusive control of the goods. With this essential element lacking when the owner himself retains control of the goods, the liability of the ferryman as a common carrier should be qualified; and when the goods are lost or injured, his liability should be governed by the ordinary rules in actions for negligence.

Sec. 68. (§ 59.) Proprietors of land vehicles like stage-coaches, omnibuses, carts, wagons, etc., are common carriers when.—The proprietors of land vehicles of every kind, such as stage and hackney coaches,[40] omnibuses,[41] cabs, drays, carts, wagons, sleds,[42] and street cars,[43] who make it a business to carry for hire the goods of such as choose to employ them, even though it may be within the limits of the same town or city, are reckoned as common carriers and held liable as such. Stage-coaches are employed principally for the carrying of passengers, and were formerly very extensively used for that

v. Clisbee; Powell *v.* Mills; and Wilson *v.* Hamilton, *supra*, were disapproved.

See also, Tower *v.* The Utica Railroad, 7 Hill, 47; Richards *v.* The Railway, 7 Com. B. 839; Midland Railroad *v.* Bromley, 17 C. B. (N. S.) 372; Brind *v.* Dale, 8 Car. & P. 207; East India Co. *v.* Pullen, 2 Strange, 690.

The same view of the liability of the ferryman was taken by Dewey, J., in White *v.* Winnissimmet Co., 7 Cush. 155; see as to delivery to ferryman, *post*, § 128.

39. See *post*, § 119.

40. As to hackney coaches, Bonce *v.* Dubuque, etc., Co., 53 Iowa, 278; Budd *v.* Carriage Co., 25 Or. 314, 35 Pac. Rep. 660, 27 L. R. A. 279.

41. As to omnibuses, Parmelee *v.* Lowitz, 74 Ill. 116; Dibble *v.* Brown, 12 Ga. 217; Parmelee *v.* McNulty, 19 Ill. 556. In the last case, it was said that "the court was authorized to take notice that the owner of an omnibus line is a common carrier just as much as the owner of a railroad or a line of steamboats. The court will take notice of the general meaning of words, and we know that an omnibus line means a line of coaches for the carriage of passengers and their baggage."

The owner of a "licensed bus" is not necessarily a common carrier, and proof of that fact will not be sufficient to hold him as such. Atlantic City *v.* Dehn, 69 N. J. Law, 233, 54 Atl. Rep. 220.

42. See *post*, § 70.

43. As to street cars, Levi *v.* R. R. Co., 11 Allen, 300.

purpose. The carriage of goods, except the luggage of passengers, is not strictly their business; but in practice they generally combine the carriage of light packages with their passenger traffic, and there is no doubt but that whenever they are so in the habit of carrying goods for hire or are so advertised or held out, their proprietors are common carriers as to such goods.[44] But where no such usage exists, and the proprietor holds himself out to the public as engaged only in the carriage of passengers, he cannot be held liable as a common carrier, although it may have been the practice of the driver of the coach, without the knowledge of the proprietor, to carry parcels for a compensation. But if such practice is known, and is submitted to by the proprietor as a part of the compensation of the driver, the rule would be different, unless the owner of the package, being informed of the fact that it was not a part of the customary business of the coach to carry packages, contracts with the driver, trusting solely to his responsibility.[45] And it has been held that where the confidence, under such circumstances, is reposed in the driver alone, he cannot be held to the responsibility of a common carrier, but only to that of an ordinary bailee for hire.[46] Stage pro-

44. Hollister *v.* Nowlen, 19 Wend. 234; Cole *v.* Goodwin, 19 Wend. 251; Walker *v.* Skipwith, Meigs, 502; Peixotti *v.* McLaughlin, 1 Strob. 468; Dwight *v.* Brewster, 1 Pick. 50; McHenry *v.* The Railroad Co., 4 Har. (Del.) 448; Frink *v.* Coe, 4 G. Greene, 555; Sales *v.* Western Stage Co., 4 Iowa, 547. *Prima facie*, the proprietors of stage-coaches, used for carrying the mails, passengers and their baggage, are not to be considered common carriers as to articles not strictly within their line of business, in the technical sense of that term. They may, however, make themselves such by special contract in a particular case, or by their general course of business. Powell *v.* Mills, 30 Miss. 231.

45. Dwight *v.* Brewster, *supra;* Beckman *v.* Shouse, 5 Rawle, 179; Butler *v.* Basing, 2 Car. & P. 613; Blanchard *v.* Isaacs, 3 Barb. 388. See, also, § 91.

46. Bean *v.* Sturtevant, 8 N. H. 146. In Sheldon *v.* Robinson, 7 N. H. 157, it appeared that the defendant was in the employment of a stage company as a driver, and that the drivers of the stage-coaches were generally in the habit of carrying packages of money for an insignificant compensation, being the same, whether the package contained more or

prietors, however, who carry passengers are liable as common carriers for their baggage, as we shall hereafter see.

Sec. 69. (§ 60.) Vehicles carrying passengers usually liable as common carriers only as to baggage.—As hacks, omnibuses, cabs, street cars and the like vehicles are employed almost exclusively for the conveyance of passengers in a city or its vicinity, a case which would make their proprietors liable as common carriers, except for the baggage of their passengers, would be exceptional; but such cases may and undoubtedly do occur. As to such baggage they are unquestionably liable as common carriers, in common with all other passenger carriers, though this was long since disputed, unless a price distinct from the fare of the passenger was paid for its carriage.[47] But this authority has been disregarded, and the rule may be said to be now settled that all kinds of passenger carriers by receiving, in their vehicles or upon their vessels, passengers and their baggage, subject themselves to the responsibility of common carriers of goods in general as to such baggage; and they become to this extent common carriers, although only the ordinary fare for the trip has been paid by the passenger, and

less. This compensation was received by the drivers to their own use. It did not appear that defendant had ever advertised or in any way held himself out as ready to carry, farther than by this habit of receiving what was offered for carriage. Parker, J., said: "This does not show him to have exercised the business of carrying packages as a public employment, because his public employment was that of a driver of a stage-coach, in the employ of others. It does not show that he ever undertook to carry goods or money for persons generally, although he may, in fact, have taken all that was offered, as a matter of convenience; or that he ever held himself out as ready to engage in the transportation of whatever was requested, notwithstanding it may have been unusual for him and other drivers (to refuse) to carry it. This was not his general employment, and there is nothing to show that he would have been liable had he refused to take this money, especially as he was in the service of another, and, as such servant, might have had duties to perform inconsistent with the duty of a common carrier."

47. Middleton *v.* Fowler, 1 Salk. 282; Upshare *v.* Aidee, 1 Comyns, 25.

even, indeed, when no fare is shown to have been paid, the passenger being liable therefor if not paid.[48]

Sec. 70. (§ 61.) Proprietors of local land vehicles are common carriers.—On the other hand, the proprietors of land vehicles which are not employed upon any regular line of transportation, but are used exclusively for the carriage of the goods of others for hire to places in the same town, city or neighborhood to which the owners of such goods may desire them to be conveyed, and who may be said to engage in a sort of jobbing business as carriers, such as drays, carts, express or delivery wagons, sleds and trucks, are according to a number of authorities in this country, strictly common carriers as to such goods.[49] Thus city express companies, engaged in carrying the baggage of travelers from one depot to another, or to hotels, are, as to such baggage, common carriers,[50] and where the defendant, in the course of his employment, had undertaken to haul upon a sled, drawn by oxen, a hogshead of sugar from the river landing to the store of the plaintiffs, and the hogshead rolled from the sled into the river and was damaged, he was held liable as a common carrier. "Every one," said the court, "who pursues the business of transporting goods for hire for the public generally, is a common carrier. . . . Draymen, cartmen and porters, who undertake to carry goods for hire as a common employment from one part of a town to another, come within the definition. So also does the driver of a slide with an ox team. The mode of transporting is im-

48. McGill *v.* Rowand, 3 Barr, 451; Hollister *v.* Nowlen, 19 Wend. 234; Cole *v.* Goodwin, *id.* 251; Bomar *v.* Maxwell, 9 Humph. 621; Hawkins *v.* Hoffman, 6 Hill, 586; Brooke *v.* Pickwick, 4 Bing. 218.

49. Story on Bail. § 496; 2 Kent's Com. 598, n; Jackson, etc., Iron Works *v.* Hurlburt, 158 N. Y. 34, 52 N. E. Rep. 665, 70 Am. St. Rep. 432, *affirming s. c.* 36 N. Y. Supp. 808, 15 Misc. 93; Cayo *v.* Pool's Assignee, 108 Ky. 124, 55 S. W. Rep. 887, 94 Am. St. Rep. 348, 49 L. R. A. 251.

50. Richards *v.* Westcott, 2 Bosw. 589; Verner *v.* Sweitzer, 32 Penn. St. 208. Draymen, cartmen, etc., are. Robertson *v.* Kennedy, 2 Dana, 431; Powers *v.* Davenport, 7 Blackf. 497; McHenry *v.* Railroad Co., 4 Harr. 448; Hebard *v.* Riegel, 67 Ill. App. 584, citing Hutchinson on Carr.

material."[51] So where the defendant was a lighterman, who carried goods between wharves and ships for any person who chose to employ him, he was held liable as a common carrier.[52] And where a drayman, whose occupation was such as to bring him within the definition of a common carrier, entered into a contract to carry certain goods to a point beyond the territorial limits within which his business was usually confined, it was held that his liability as a common carrier continued until the contract was performed; his liability in such a case being similar to that of a common carrier by railroad which had contracted to carry goods to a point beyond its own line.[53] But where the defendant was engaged in the business of trucking goods from a railroad depot to different stores within a city, but for particular customers, and at a price in each case

51. Robertson *v.* Kennedy, 2 Dana, 430.

52. Ingate *v.* Christie, 3 Car. & Kir. 61. But in Brind *v.* Dale, 8 Car. & P. 207, it appeared that the defendant was the owner of a number of carts which were kept ready to be hired by any person who chose to employ them, either by the hour, day or job, defendant being what was called a town carman. One of these carts was employed by the plaintiff to carry certain packages a short distance. The cart was driven by the defendant, plaintiff agreeing to go along with it and keep watch upon the goods. At the end of the trip it was found that one of the packages was missing. Lord Abinger instructed the jury that, in his opinion, the defendant, who was sued for the lost package, was not, in performing the service of carriage under the circumstances, a common carrier. Of this case Judge Story remarks: "What substantial distinction is there in the case of parties who ply for hire in the carriage of goods for all persons indifferently, whether the goods are carried from one town to another, or from one place to another in the same town? Is there any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out as ready and willing to carry goods for any persons whatsoever, to or from any places in the same town or in different towns?" Story on Bail. § 496, n. But see what is said on this subject by Perley, J., in Moses *v.* The Railroad, 24 N. H. 71, who treats the question as doubtful, upon principle.

53. Farley *v.* Lavary, 107 Ky. 523, 54 S. W. Rep. 840, 47 L. R. A. 383.

fixed by special contract, it was held that he was not a common carrier.[54]

Sec. 71. (§ 62.) **Warehousemen, wharfingers and forwarders of freight, when common carriers.**—Warehousemen, wharfingers and forwarders of freight, so long as they confine themselves to the business which their names import, cannot be held liable as common carriers. If goods are deposited with them merely as the initiatory step towards starting them *in itinere*, they having undertaken to do no more than to safely keep them and forward them when the opportunity offers, and being in no wise interested in their carriage after delivery to the carrier, it would be contrary to the well-settled principles of the law to hold them to the responsibilities of common carriers. And although a wharfinger may accept goods for the purpose of being transported, if the goods so accepted are those only of his own wharf customers, the goods of strangers not being received, he is not, as to such goods, a common carrier and cannot be held liable as such.[55] But where warehousemen, wharfingers, or forwarders of freight combine the two characters, treating the deposit with them as being merely for the convenience of further carriage or to encourage or promote their business as common carriers, they will be held to a strict liability as such from the time of the delivery to them. In such cases the deposit is a mere accessory to the carriage, and for the purpose of facilitating it, and the liability as carrier begins with the receipt of the goods.[56]

54. Faucher *v.* Wilson, 68 N. H. 338, 38 Atl. Rep. 1002, 39 L. R. A. 431.

55. Chattock & Co. *v.* Bellamy & Co. (1895), 64 L. J. Q. B. 250.

56. Story on Bail. § 536; Forward *v.* Pittard, 1 T. R. 27; Schloss *v.* Wood, 11 Colo. 287. In this case the court cite this section with approval, and say: "Whether a person is a common carrier depends wholly upon whether he holds himself out to the world as such, and he can hold himself out as a common carrier by engaging in the business generally, or by announcing or proclaiming it by cards, advertisements, or by any other means that would let the public know that he intended to be a common or general carrier for the public. Railway Co. *v.* Nichols, 9 Kans. 252, 253. Were the appellees act-

Sec. 72. (§ 63.) Same subject—When liability begins.—But if a person who is at the same time both a warehouseman and a forwarding merchant receive goods on deposit to be forwarded by his line according to the future orders of the owner, or if anything is still to be done by the owner to put them in readiness for shipment, he is not chargeable as a carrier, but merely as a warehouseman, until such orders are given or until they are put in condition for carriage; as where the goods are deposited without instructions as to their place of destination, either by marks or otherwise, or to await orders,[57] or until the charges for the transportation are paid, if that is required by the carrier; or if anything remains to be done or any expense to be incurred to put them in a condition to bear transportation.[58] And if the carrier should require the prepayment of freight charges as a condition to his assuming any obligation in respect to transporting the goods, and they are placed in cars standing on a spur track from which place it is necessary to move them to a freight depot to be weighed in order to compute the proper charges, the delivery of the goods for transportation will be treated as having been made at the freight depot, and the carrier's liability, until the goods are weighed and the charges paid, will be that of a warehouseman.[59] If the warehouseman is also to be the carrier or is interested in the carriage, as soon as the orders are given to forward the goods, or other conditions performed

ing in the premises as common carriers or forwarders merely? This question should have been submitted to the jury with proper instructions." See also, Pontifex & Wood (Lim.) *v.* Hartley (App.) (1893), 62 L. J. Q. B. 196.

57. Michigan Railroad *v.* Shurtz, 7 Mich. 515; Moses *v.* The Railroad, 4 Foster, 71; Rogers *v.* Wheeler, 52 N. Y. 262; O'Neil *v.* The Railroad, 60 N. Y. 138; Fitchburg, etc., Railroad *v.* Hanna, 6 Gray, 539; Barron *v.* Eldridge, 100 Mass. 455; Murray *v.* Steamship Co., 170 Mass. 166, 48 N. E. Rep. 1093, 64 Am. St. Rep. 290; Railway *v.* Beard (Tex. Civ. App.), 78 S. W. Rep. 253; Schmidt *v.* Railway Co., 90 Wis. 504, 63 N. W. Rep. 1057. See also § 112.

58. Wade *v.* Wheeler, 3 Lans. 201.

59. Dixon *v.* Railway, 110 Ga. 173, 35 S. E. Rep. 369, citing Hutchinson on Carr.

upon which their transportation was suspended, he holds the goods for immediate shipment, and his liability as a common carrier at once commences. And although he may delay in sending them forward, or for his own convenience place them temporarily in store, his liability as a common carrier will still remain.[60] But if the warehouseman or forwarding agent have no interest in the vessel or vehicles by which the goods are to be transported and no interest in the freight to be earned, he will not be liable as a common carrier, although he take upon himself to pay the expenses of the transportation for which he is to receive compensation from the owner of the goods.[61]

Sec. 73. (§ 64.) Water-craft, railways and express companies are chief carriers.—But by far the greater part of the carrying business is now done by sea-going and coasting vessels, vessels and steamboats upon lakes and rivers, canal-boats, railways and express companies. These, in fact, except in mere local transportation, have an almost complete monopoly

60. Schmidt *v.* Railway Co., *supra.*

Where the agent of a steamboat company informed a prospective passenger that it would be advisable for her to forward her baggage to the steamer a few days in advance of the time of sailing, and that it would be placed in her stateroom as soon as received, and the baggage was sent as directed, but for temporary convenience was placed in a storehouse where it was destroyed by fire, the steamship company was held responsible as a common carrier for the loss. North German Lloyd S. S. Co. *v.* Bullen, 111 Ill. App. 426.

61. Story on Bail., § 502; Briggs *v.* The Railroad, 6 Allen, 246; Platt *v.* Hibbard, 7 Cow. 497; Roberts *v.* Turner, 12 Johns. 232; Brown *v.* Denison, 2 Wend. 593; Ackley *v.* Kellogg, 8 Cow. 223; Stannard *v.* Prince, 64 N. Y. 300; Teall *v.* Sears, 9 Barb. 317.

If the owner of goods deposits them for storage with a warehouseman who is also a common carrier, and later terminates the storage agreement, pays the storage charges, and orders the goods to be carried to his residence, the liability of common carrier commences at the time of the acceptance of the owner's order for transportation; and if the goods are destroyed by fire after such order is given, but before delivery, the warehouseman will be liable as a common carrier for their loss. Snelling *v.* Yetter, 49 N. Y. Supp. 917, 25 App. Div. 590.

of the carrying trade, and have become so identified with the business that the very name of common carrier suggests them at once to the mind, and the case in which litigation should arise, involving the duties and liabilities of the common carrier, which did not concern one of these, would be exceptional.

Sec. 74. (§ 65.) Owners of ships are usually common carriers.—Ships have always been the great carriers in the commerce of the world; but it was not determined until the time of Charles II., in England, that they were common carriers, and liable as such. The question there first arose in the Court of King's Bench in the case of Morse *v.* Slue, reported in 1 Ventris, 190, and it was decided, upon great consideration, as we are told, that the master of the ship, although entirely blameless, was liable for the goods which had been intrusted to him for carriage, the loss not having occurred by the act of God or of the king's enemies, but from robbery. This judgment has never since been questioned and has often been recognized by courts of the highest authority as incontrovertible law.[62] And they are liable as common carriers whether the transportation be from port to port within the same state or country, or beyond the sea, at home or abroad.[63] But, although the owners of ships are in general terms said to be common carriers, yet this is to be understood with the qualification that they bring themselves within the terms of the definition of a common carrier; and the question, whether common carrier or not, when applied to a ship as well as when the question is as to the character in which any other vehicle of transportation by water is employed, is to be determined exactly upon the same principles as when the reference is to a carrier by land;

62. Laveroni *v.* Drury, 8 Exch. 166; 16 Eng. L. & E. 510; Coggs *v.* Bernard, Ld. Raym. 909; Boson *v.* Sanford, 2 Salk. 440; King *v.* Shepherd, 3 Story, 349; Hastings *v.* Pepper, 11 Pick. 41; Gage *v.* Tirrell, 9 Allen, 299; Clark *v.* Barnwell, 12 How. 272; Propeller Niagara *v.* Cordes, 21 *id.* 7; The Delaware, 14 Wall. 579; The Maggie Hammond, 9 *id.* 435.

63. Elliott *v.* Rossell, 10 Johns. 1. Proprietors of ocean steamships are common carriers. Liverpool Steam. Co. *v.* Phenix Ins. Co., 129 U. S. 397.

and every ship which carries for hire is not necessarily a common carrier.[64]

Sec. 75. (§ 66.) Owners of steamboats and canal-boats are common carriers.—Steam vessels engaged in the coasting trade and in the navigation upon our bays, sounds and lakes, are also common carriers when engaged in the carrying trade for the general public, as has been repeatedly held.[65] So steamboats upon our navigable rivers are almost universally carriers of both passengers and freight, and as to such freight and the baggage of their passengers they are strictly common carriers; and at least as to such freight as is usually carried by them, they will be considered conclusively liable as common carriers.[66] And owners of canal-boats come strictly within the

64. It is stated by Mr. Parsons in his work on Shipping, p. 174, and by other authorities, that no ship is a common carrier that does not ply regularly on some definite route or between certain termini as a packet, and that a general ship is not a common carrier. The law has, however, been generally assumed to be otherwise. In the Liver Alkali Co. *v.* Johnson, L. R. 9 Exch. 338, this point came directly before the court of Exchequer Chamber. The defendant was a barge owner and let out vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement and a barge was not let to more than one person. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure; and it was held, affirming the judgment of the Court of Exchequer (L. R. 7 Exch. 267), that the defendant had incurred the liability of a common carrier and was liable though the goods were lost without any fault on his part.

65. Schooner Reeside, 2 Sumner, 567; Crosby *v.* Fitch, 12 Conn. 410; McClure *v.* Hammond, 1 Bay. 99; Sch'r Emma Johnson, 1 Sprague, 527; Oakey *v.* Russell, 18 Mar. (La.) 58; Parker *v.* Flagg, 26 Me. 181; The Propeller Commerce, 1 Black, 582; The Niagara *v.* Cordes, 21 How. 26; Clark *v.* Barnwell, 12 *id.* 272; The Commander-in-Chief, 1 Wall. 51; Hastings *v.* Pepper, 11 Pick. 41.

66. Citizens' Bank *v.* The Nantucket S. B. Co., 2 Story, 16; Jencks *v.* Coleman, 2 Sumner, 221; Gilmore *v.* Carman, 1 Sm. & M. 279; McGregor *v.* Kilgore, 6 Ohio, 358; Bowman *v.* Hilton, 11 *id.* 303; McArthur *v.* Sears, 21 Wend. 190; Dunseth *v.* Wade, 2 Scam. 285; Hart *v.* Allen, 2 Watts, 114; Harrington *v.* M'Shane, *id.* 443; Warden *v.* Greer, 6 *id.* 424; Pardee *v.* Drew, 25 Wend. 459; Porterfield *v.* Humphreys, 8 Humph. 497; Kirtland *v.* Montgomery, 1 Swan, 452; Swindler *v.* Hilliard, 2 Rich. 286; Hollister *v.* Nowlen,

rule, if they carry for all persons, indifferently, for hire,[67] but they may show that they were merely private carriers.[68]

Sec. 76. (§ 67.) Railroad companies are common carriers.—Railroad companies are, by their very nature and organic character, common carriers, whether made so by the general statute or by their charters, or not; and whenever they are made so by the express provisions of a law, such provisions will be considered as merely declaratory of the law as it already existed,[69] and will neither increase their duties and obligations nor in any respect qualify their liability. They have sometimes attempted to defend themselves from liability by disputing the proposition that they were common carriers, but the contention has received no countenance from the courts, and it has been held in many cases, for reasons peculiarly applicable to them, that, as carriers of both passengers and freight, the rules as to the responsibility of common carriers and of passenger carriers should be applied to them with full

19 Wend. 234; Cole *v.* Goodwin, *id.* 251; Hale *v.* The N. J. Nav. Co., 15 Conn. 539; Jones *v.* Pitcher, 3 Stew. & P. 136; Sprowl *v.* Kellar, 4 *id.* 382; Powell v. Myers, 26 Wend. 591; Reed *v.* Steamboat Co., 1 Marr (Del.), 193, 40 Atl. Rep. 955.

67. Hyde *v.* The Trent Nav Co., 5 T. R. 389; The Trent Nav. Co. *v.* Wood, 3 Esp. 127; Harrington *v.* Lyles, 2 Nott & McCord, 88; Williams *v.* Branson, 1 Murph. 417; Fuller *v.* Bradley, 25 Pa. St. 120; Spencer *v.* Daggett, 2 Vt. 92; De Mott *v.* Laraway, 14 Wend. 225; Arnold *v.* Hallenbake, 5 *id.* 33; Parsons *v.* Hardy, 14 *id.* 215; Bowman *v.* Teal, 23 *id.* 306; Humphreys *v.* Reed, 6 Whart. 435; Fish *v.* Clark, 49 N. Y. 122.

68. See *post*, § 89.

69. Thompson, etc., Electric Co. *v.* Simon, 20 Or. 60, 25 Pac. Rep. 147, 23 Am. St. Rep. 86, 10 L. R. A. 251, citing Hutchinson on Carr.

In the case of the Chicago, etc., R. R. *v.* Thompson, 19 Ill. 578, in which the defendant was sued for the loss of bank bills delivered to it for carriage, it was contended that neither the charter of the road nor any other law of the state made it a common carrier for any purpose, and certainly not one for the carriage of bank bills. But the court said in reply to this objection, "We suppose it is not necessary that the charter should provide in so many words that the railroad created by it shall be a common carrier. The authorities are numerous to the point that such companies, using cars for the purpose of carrying goods for all persons indifferently for hire, and whose custom and uniform practice is to do so, are common carriers and liable as

force. Being recognized as public utilities as well as private enterprises, extensive rights and franchises have been conferred upon them which are not enjoyed by other carriers, among these being the right to invoke the power of eminent domain. Not only have they been fostered by the government, but by reason of aggregation of capital and the great facilities which they control for the transportation of all the commodities of commerce, they have practically monopolized the land carriage of the country. It is but just, therefore, that in their dealings with the public, whether as carriers of goods or of passengers, they should be held to that strict accountability which the public safety and policy require. As said by Shaw, C. J., in Norway Plains Company *v.* The Railroad,[70] "that railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them and carry goods for hire, are circumstances which bring them within all the rules of the common law and make them eminently common carriers. Their iron roads, though built in the first instance by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can only be justified on that ground. . . . Being liable as common carriers the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods during the transit, except those arising from the act of God or a public enemy." And thus the law has been everywhere held with the most perfect unanimity.[71]

such. There can be no doubt on this point."

70. 1 Gray, 263.

71. Thomas *v.* The Boston, etc., R. R., 10 Met. 472; Rogers Locomotive Works *v.* The Railroad, 5 C. E. Green (N. J.), 379; Fuller *v.* The Railway, 21 Conn. 570; Jones *v.* The Railroad, 27 Vt. 399; Noyes *v.* The Railroad, *id.* 110; Root *v.* The Railroad, 45 N. Y. 524; Contra Costa, etc., R. R. *v.* Moss, 23 Cal. 323; Elkins *v.* The Railroad, 3 Foster, 275; East Tennessee, etc., R. R. *v.* Nelson, 1 Cold. 272; Railroad Co. *v.* Queen City Coal Co., 13 Ken. Law Rep. 832; Memphis News Publishing Co. *v.* Railway Co., 110 Tenn. 396, 75 S. W. Rep. 941, 63 L. R. A. 150, citing Hutchinson on Carr.

The fact that the road is not yet fully completed and formally opened for business will not relieve the company, where it has actually undertaken to carry in the usual way.[72] And a private individual operating the road is a common carrier, the same as a corporation would be.[73] But, as has been seen, a railroad company is not liable as a common carrier where, by special agreement, it undertakes to carry something which it is not its business to carry,[74] or where it departs from the usual method of doing business.[75]

Sec. 77. (§ 67a.) Railroad receivers, trustees, etc., are common carriers.—So where the railroad has passed out of the control of the company and has come under the custody and management of some official representative, as a receiver, or a trustee for bondholders, who operates and controls it, such receiver[76] or trustee[77] is liable as a common carrier.

Sec. 78. (§ 67b.) Street railways are common carriers.—Street railways are common carriers of passengers.[78] They are also chargeable as common carriers of goods and merchandise where they have also assumed the business of transporting goods for hire.[79]

Sec. 79. (§ 67c.) Sleeping and parlor-car companies not common carriers.—As will be seen in later sections, sleeping

72. Little Rock, etc., R. R. *v.* Glidewell, 39 Ark. 487. A belt line, engaged in switching trains on its own road from a station to neighboring stockyards, held to be doing more than a mere switching business, and to be a common carrier. Fleming *v.* Railroad Co., 89 Mo. App. 129.

73. Davis *v.* Button, 78 Cal. 247.

74. See *ante*, § 59.

75. See *ante*, § 60.

76. Blumenthal *v.* Brainerd, 38 Vt. 402; Paige *v.* Smith, 99 Mass. 395; Nichols *v.* Smith, 115 Mass. 332.

77. Faulkner *v.* Hart, 44 N. Y. Superior Ct. 471; Sprague *v.* Smith, 29 Vt. 421; Rogers *v.* Wheeler, 2 Lans. 486; 43 N. Y. 598.

78. Citizens Ry. Co. *v.* Twiname, 111 Ind. 587; Spellman *v.* Transit Co., 36 Neb. 890, 55 N. W. Rep. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316; Pray *v.* Railroad Co., 44 Neb. 167, 62 N. W. Rep. 447, 48 Am. St. Rep. 717; Railway Co. *v.* Godola, 50 Neb. 906, 70 N. W. Rep. 491.

79. Levi *v.* Railroad Co., 11 Allen, 300.

and parlor-car companies are not liable as common carriers or as inn-keepers.[80]

For the purpose, however, of the Interstate Commerce Act, as amended June 29, 1906, sleeping and parlor-car companies are defined as common carriers.

Sec. 80. (§ 68.) Express companies are common carriers.— With equal unanimity, it has been held that express companies are common carriers of such goods and parcels as they, in their line of business, undertake to carry. "There are considerations," said the court in Stadhecker *v.* Combs,[81] justifying a strict application of the law of common carriers to express companies. They profess to employ trusty agents, who are charged with the safe custody and speedy transit and delivery of all packages put in their charge. The effect of these inducements is in some measure to supersede the forwarding merchant, and to limit the liability of railroad and steamboat companies, who may be as faithful, and are certainly as responsible, agents. If they shall, by the promise of decided advantages over the usual modes of transportation, secure most of the business generally intrusted to common carriers, the public is concerned that they should be held to a rigid fulfillment of the promise. They cannot attain a greater speed than the railroad or steamboat which conveys them, and there is no proof that they are, in other respects, more trustworthy. The only advantage which in truth they can offer is the safer custody and more certain delivery of goods to the consignee without storage. These temptations may induce the public to employ them at an increased rate, and they have no reason to complain of an exact application of the rule of law which enforces the responsibility which they voluntarily assume. We should be regardless of the great interests daily committed by the public to the express companies, with a confidence induced by their tempting offers, if their liability for the safe carriage and delivery is not rigorously enforced."[82]

80. See *post*, § 1130, *et seq.*

81. 9 Rich. (L. R.) 193.

82. And see to the same effect, Southern Express Co. *v.* Crook, 44

Sec. 81. (§ 69.) Same subject—Peculiarities of their business.—Express companies, however, conduct their business in a manner somewhat different from that pursued by other carriers. Instead of providing their own conveyances, they, except for the purpose of local delivery, employ the conveyances of other carriers, such as steamboats and railroads, for the carriage of their freight, and, when they employ the agency of railways in their traffic, they forward their parcels, not by the ordinary freight trains of such roads, but by those used for more expeditious transit, which constitutes one of the principal advantages offered by them. Expedition, promptness, and the greater security they are thought to afford, from the fact that the goods intrusted to them are supposed to be under the watchful care and direct supervision of their agents from the moment of their reception until their final delivery, are the great inducements to their employment. They are, moreover, as we shall hereafter see, bound to a personal delivery of the goods intrusted to them for carriage, a requirement which is not now exacted of any of the other principal carriers of goods.

Sec. 82. (§ 70.) Same subject—Attempts to secure exemption.—Because of this peculiarity in the employment of the means of conveyance afforded by others, the contention has been made by these companies that they were not common carriers, but transacted their business in the character of for-

Ala. 468; Gulliver *v.* The Adams Ex. Co., 38 Ill. 503; Southern Ex. Co. *v.* Newby, 36 Ga. 635; Southern Ex. Co. *v.* Womack, 1 Heisk. 256; U. S. Ex. Co. *v.* Backman, 28 Ohio St. 144; Grogan *v.* Adams Ex. Co., 114 Pa. St. 523; Southern Ex. Co. *v.* Glenn, 16 Lea, 472; Bardwell *v.* American Ex. Co., 35 Minn. 344; Bennett *v.* Northern Ex. Co., 12 Ore. 49; Overland Ex. Co. *v.* Carroll, 7 Col. 43; Mather *v.* American Ex. Co., 138 Mass. 55; Pacific Ex. Co. *v.* Darnell, 62 Tex. 639; Galt *v.* Adams Ex. Co., 4 MacA. 124; Bernstine *v.* Union Ex. Co., 40 Ohio St. 451; Wells *v.* American Ex. Co., 55 Wis. 23; United States *v.* Pacific Ex. Co., 15 Fed. Rep. 867; United States Ex. Co. *v.* Root, 47 Mich. 231; Adams Ex. Co. *v.* McConnell, 27 Kans. 238; Hadd *v.* United States Ex. Co., 52 Vt. 335; Southern Ex. Co. *v.* Van Meter, 17 Fla. 783; Boscowitz *v.* Adams Ex. Co., 93 Ill. 523; American Ex. Co. *v.* Smith, 33 Ohio St. 511.

warders and were not therefore liable for losses occurring from the negligence of those whom they thus employed. But this claim to exemption from the ordinary liabilities of common carriers has not been sustained by the courts. These subsidiary means of transportation are held to be the mere agencies employed by such companies, for whose acts they are strictly responsible;[1] and the carrier whose vehicle is thus used be-

1. This argument was thus disposed of in Buckland *v.* The Adams Ex. Co., 97 Mass. 124: "The name or style under which they assume to carry is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying and delivering goods, wares and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. . . .

"But it is urged on behalf of the defendants that they ought not to be held to the strict liability of a common carrier, for the reason that the contract of carriage is essentially modified by the peculiar mode in which defendants undertake the performance of the service. The main ground on which this argument rests is that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are selected, are not managed by them nor subject to their direction or supervision; and that the rules of the common law regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight over them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed in part, at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that, at common law, in the absence of express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily

implies that they are to be carried by the party with whom the contract is made, or by the servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination, unless the fulfillment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are to be carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust which can be executed only by the contracting party himself, or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another, by means of wagons or stages, could escape liability for the safe carriage of the property over any part of the designated route by showing that the loss had happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control. The truth is that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor."

The same question was involved and settled in the same way in the case of The Bank of Kentucky *v.* The Adams Express Co., 3 Otto (93 U. S. R.), 174. In this case, however, the question was decided the other way in the circuit court by Ballard, J. (Cen. Law Journal 1874, p. 436). But his judgment was reversed on error. So in Hersfield *v.* Adams, 19 Barb. 577, this argument for the express carrier prevailed with the court, and it was held that, having no vehicles of his own by which the transportation could be effected, and this being known to the sender of the goods, the employment of the means of other carriers relieved the carrier who had undertaken the forwarding of the goods from responsibility as a common carrier to their owner. But this is inconsistent with the holding of the same court in Russell *v.* Livingston, 19 Barb. 346, and was rightly denied to be the law in Place *v.* The Union Express Co., 2 Hilton, 27. And see U. S. Express Co. *v.* Backman, *supra;* Transportation Co. *v.* Bloch, 86 Tenn. 392.

An express company, undertaking to carry live stock in cars furnished by it, and which employs a railroad company for the purpose of transporting the cars, becomes responsible for the negligence of the subsidiary agencies employed. American Express Co. *v.* Ogles (Tex. Civ. App.), 81 S. W. Rep. 1023, citing Hutchinson on Carr.

comes likewise liable, upon the principles of agency, to the owner of the goods, according to the terms of his contract with his employer.[2]

Sec. 83. (§ 71.) Same subject.—Cannot escape liability by assuming name of "forwarders."—These carriers have also attempted to escape from their liability as common carriers by assuming the name of forwarders, and by contracting to convey the goods in that character. But in this attempt they have likewise failed; and it has been held that, when they undertake the carriage of parcels, it will make no difference under what name or assumed title they may have done so. The law, regardless of forms or names, will look at the real transaction, and if the contract be in fact one for the transportation and delivery of the goods to a consignee, no matter through what agencies it is to be effected, the undertaking will be construed as that of a common carrier.[3]

Sec. 84. (§ 72.) Same subject—Nor by assuming name of "dispatch company," "fast freight line," etc.—Other carriers under the names of dispatch companies,[4] fast freight lines[5] and the like, have also come into existence, which conduct their business upon the same principle as express companies, that is, by the employment of the means of transportation furnished to them by others, and to which, for the same reasons, the same rigid rule of responsibility as common carriers is applied. "We cannot close our eyes," says the court in The Bank of Ken-

2. New Jersey S. Nav. Co. *v.* Merchants' Bank, 6 How. 344.

3. Christenson *v.* The Am. Ex. Co., 15 Minn. 270; Read *v.* Spalding, 5 Bosw. 404; Southern Ex. Co. *v.* McVeigh, 20 Gratt. 264; Bank of Kentucky *v.* Adams Ex. Co., 93 U. S. 174.

4. Dispatch companies are common carriers. Transportation Co. *v.* Bloch, 86 Tenn. 392; Merchants' Disp. Co. *v.* Cornforth, 3 Col. 280; Robinson *v.* Merchants' Disp. Co., 45 Iowa, 470; Stewart *v.* Merchants' Disp. Co., 47 Iowa, 229; Wilde *v.* Merchants' Disp. Co., 47 Iowa, 247; Bancroft *v.* Merchants' Disp. Co., 47 Iowa, 262; Merchants' Disp. Co. *v.* Bolles, 80 Ill. 473; Merchants' Disp. Co. *v.* Leysor, 89 Ill. 43; Merchants' Disp. Co. *v.* Joesting, 89 Ill. 152.

5. Fast freight lines are common carriers. Read *v.* Spaulding, 5 Bosw. 395.

tucky *v.* The Adams Express Company,[6] "to the well-known course of business in the country. Over many of our railroads, the contracts for the transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies which have arrangements with the railroad companies for the carriage. In this manner, some of the responsibilities of common carriage are often sought to be evaded; but in vain. Public policy demands that the right of the owners to absolute security against the negligence of the carrier and of all persons engaged in performing the carrier's duty shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company." And in the case of J. H. Cowie Glove Co. *v.* Merchants' Dispatch Transportation Co.[7] it is said: "To constitute a common carrier, it is not essential that the person or corporation undertaking such service own the means of transportation. If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends."

Sec. 85. (§ 73.) Special circumstances under which carrier not deemed to be common carrier.—But it is not to be assumed that in all these cases the ship, the steamboat or other kind of carrier mentioned is necessarily and at all events to be held liable as a common carrier for a failure safely to transport and deliver whatever may be intrusted to it. Many of them will be presumed to be common carriers. Courts will take notice judicially of the fact that the owners of ships, railroads, steamboats, and all others whose business it is universally known is to carry goods for hire, are common carriers of certain classes of goods, and no proof will be required to establish such fact.[8] But it will not be presumed that the owners of a stage line are

6. 93 U. S. 174.

7. —Iowa, — 106 N. W. Rep. 749.

8. Courts will take judicial notice that railway companies are common carriers. Boyle *v.* Railway Co., 13 Wash. 383, 43 Pac. Rep. 344.

common carriers as to goods generally, because it is well known that such lines are intended generally for the carriage of passengers and not of goods. In order, therefore, to fix upon them the liability of common carriers for anything except the baggage of their passengers, it must be shown that by usage, or by their holding themselves out as such, the public is justified in so regarding them. And even as to such carriers as are *prima facie* public or common carriers, it may be shown that, in the particular instance or under the circumstances of the case, they did not undertake to transport and are not liable as common carriers.[9] It may be shown, for instance, that the goods were carried by the ship under a charter-party giving to the hirer its whole capacity; in which event the owner would not be a common carrier, but a bailee to transport as a private carrier for hire.[10] Or if the owner employ his vessel in his own business and exclusively on his own private account, and for accommodation takes goods on board to be carried, although it may be for hire, he will not be deemed a common carrier.[11]

Sec. 86. (§ 74.) Same subject—Illustrations.—Where an attempt was made to hold the owners of a steamboat liable for money or bank bills delivered to the clerk of the boat to be carried to another point on the river, it was said that they could not be held liable. It was conceded that they were common carriers as to goods and passengers, and while money and bank bills were admitted to be goods in a certain sense and for certain purposes, they were not ordinarily so considered, it was said, and the ordinary carrier of goods could not be presumed to be a carrier as to them. And the question was asked, Would the owners have been liable to an action if the clerk had refused to take the money.[12] And, in several cases in which it appeared that steamboat companies had been incorporated for

9. Railroad Co. *v.* Wallace, 66 Fed. 506, 14 C. C. A. 257, 24 U. S. App. 589, 30 L. R. A. 161, citing Hutchinson on Carr.

10. Lamb *v.* Parkman, 1 Sprague, 343.

11. Allen *v.* Sackrider, 37 N. Y. 341; Story on Bail. § 501.

12. Lee *v.* Burgess, 9 Bush, 652.

the transportation of "goods, wares and merchandise," it has been held that the companies were not liable for packages of money or bank bills, they not being goods, wares or merchandise, unless the liability could be imposed by showing that, by usage and custom, the carriage of such packages had grown to be a part of their business.[13] But where such usage is shown, the owners of the boat may be held liable.[14]

13. Sewall *v.* Allen, 6 Wend. 346; Citizens' Bank *v.* The Nantucket S. B. Co., 2 Story, 33.

14. Kirtland *v.* Montgomery, 1 Swan 452; Hosea *v.* McCrory, 12 Ala. 349.

In Cincinnati, etc., Mail Co. *v.* Boal, 15 Ind. 345, it was shown to have been long a custom for the clerks of the boats of the line to carry packages of money from one port to another, without compensation, further than the expectation that for the favor thus conferred the boat would be preferred for freight, in case the package was accompanied by an order for goods; but it was held that the boat owners were not liable for the loss of such packages because there was no fixed or certain remuneration, nor that any could be recovered; and because it did not appear that the custom of carrying such packages had grown up with the knowledge of the owners, or was other than a mere accommodation usage.

This question as to the liability of the owners of steamboats for money packages intrusted to officers of the boat for carriage has been several times before the supreme court of Missouri, which has uniformly declined to hold such owners liable, because no well-known or established usage for such boats to carry money or bank-notes for compensation as was necessary to fix the liability upon the owners was proven. In Whitemore *v.* The S. B. Caroline, 20 Mo. 513, the language used was that the evidence showed "what usually appears in actions of this sort—that persons are willing to have their money carried as a favor, and at the same time to hold the boat liable for its loss. Freight or money must be proportioned to the risk assumed. No owner of a boat would permit her to carry money without a reward compensating for the risk if he was aware that he would be liable in the event of loss. Persons use the captains or clerks of steamboats to carry money gratuitously, and hire is never heard of until the money is lost, and then some person is hunted up to prove that some time in the course of his life he carried money on a steamboat for hire, and this is showing a usage. If boats would invariably charge a compensating hire for carrying money, and this was universally known, the business of carrying money by boats would soon be at an end. Persons cannot trust money with clerks, to be carried as a favor, and afterwards, when the money is lost, be permitted to show that it was to be transported for hire. This thing of hire is scarcely ever heard of

Sec. 87. (§ 75.) Whether railroad transporting cars by contract is common carrier.—And it has been held that if the owner of the goods, by contract with a railroad, hire from it cars for the loading and transportation of the goods, the road agreeing to furnish the motive power and the use of its road only in the transportation, it will not be considered that the company, in thus transporting the goods, does so in the capacity of common carrier, and that it will not be held liable for any loss or damage to the goods, under such circumstances, not occasioned by its negligence.[15] This, however, has been disputed, and it has been elsewhere held that under such circumstances the railroad company is still liable, as a common carrier, for the safety of the goods.[16]

Sec. 88. (§ 75a.) Same subject—How, when railroad company does not own cars—Circus train.—A similar question is raised where the railroad company does not own or furnish the cars, but agrees to furnish the track and motive power for the transportation of loaded cars owned or furnished by the other party. Cases of this character, in which railroad companies have by contract, undertaken to transport circus cars, owned and regulated by circus companies, have several times come before the courts, and the views taken were that the railroad companies did not, by such contracts, assume the duties and obligations of common carriers.[17] Thus in the case of Coup *v.*

but in the case of loss; and then to make the boat or owner liable would be great injustice. There is no reciprocity in it." And see, to the same effect, Chouteau *v.* The S. B. St. Anthony, 16 Mo. 216, and 20 *id.* 519.

The question was no doubt formerly of much greater importance than now, when so many other and safer modes of making remittances of money than by steamboats as carriers can be employed.

15. E. Tenn., etc., R. R. *v.* Whittle, 27 Ga. 535; Railroad *v.* Dunbar, 20 Ill. 623; Kimball *v.* The Railroad, 26 Vt. 247.

16. Mallory *v.* The Railroad, 39 Barb. 488; Hannibal, etc., R. R. *v.* Swift, 12 Wall. 262.

17. Robertson *v.* The Railroad, 156 Mass. 525, 31 N. E. Rep. 650, 32 Am. St. Rep. 482; Railroad Co. *v.* Wallace, 66 Fed. 506, 14 C. C. A. 257; 24 U. S. App. 589, 30 L. R. A. 161; Forepaugh *v.* The Railroad, 128 Penn. St. 217, 18 Atl. Rep. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508; Wilson *v.* The Railroad, 129 Fed. 774, *affirmed*, 133 Fed. 1022, 66 C. C. A. 486.

Wabash Railway Company,[18] the railway company, by virtue of a special contract, undertook to transport a circus and menagerie with all its horses, wild animals, tents and other paraphernalia, upon cars owned and specially fitted for the purpose by the circus proprietors, and which were loaded and regulated by the proprietors' employees. The contract expressly stipulated that the undertaking was not made by the company as a common carrier, and that the company should not be responsible for damages arising from want of care in running of cars or otherwise. The cars were made up into two trains, which collided and caused injury. In an action against the company it was urged that the undertaking was that of a common carrier and that the provisions for exemption from liability were therefore inoperative.

Said Campbell, J.: "Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. The price was shown to be only ten per cent. of the rates charged for carriage, and the whole arrangement was peculiar. If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may extend. In our view, it was in no sense a common carrier's contract, if it involved any principle of the law of carriers at all.

The business of common carriage, while it prevents any right to refuse carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons or by their cars. It is not important now to consider how far, except as to owners of goods in the cars forwarded, the reception of cars loaded or unloaded involves the responsibility of carriers as to the owners of the cars as such. The duty to receive cars of other persons, when existing, is usually fixed by the railroad laws and not by the common law. But it is not incumbent on com-

18. 56 Mich. 111.

panies in their duty as common carriers to move such cars except in their own routine. They are not obliged to accept and run them at all times and seasons and not in the ordinary course of business."

Sec. 89. (§ 76.) Owners of canal and ferry-boats may show that they are not common carriers.—So, as we have seen,[19] the owner of a canal-boat may show, when he is sued for the loss of the goods, that he is not a common carrier, but was employed as a private carrier for hire and that he is not therefore liable for the loss.[20] And the ferry-man may show that his ferry was not intended or used for public accommodation, but merely for convenience of access to his mill, and that he received no compensation for the ferriage except in the increase of his business as a miller, which, though a benefit incidentally accruing, does not constitute hire for the service nor give rise to an obligation to pay for it.

Sec. 90. (§ 77.) No carrier required to carry every kind of goods.—Innumerable kinds of goods may be intrusted to carriers; and no carrier can adapt his means of conveyance to every kind which may be offered. No one is, therefore, to be understood to be engaged in the business universally, in this sense.[21] The demands of commerce and business have in this, as in all other vocations, required a division of labor, and the character and particular nature of the business of the common carrier sometimes become of the greatest importance in deciding upon the question of his liability. The heaviest and bulkiest freights as well as the lightest parcels, from the product of the stone-quarry to the most delicate fabric of the factory, seek transportation by the common carrier; and the different degrees of care, labor and watchfulness, as well as the different modes of conveyance required for them, make it impossible for him to adapt his business to them all. And hence, it by no means follows, from the fact that the carrier is a common

19. See *ante*, § 65.

20. Fisk *v.* Clark, 49 N. Y. 122; Beckwith *v.* Frisbie, 32 Vt. 559.

21. See *ante*, § 59.

carrier, that he can be required to carry all kinds of goods. The word "goods," when used in defining his business, must be interpreted to mean such things as, from usage and custom, his mode of conveyance, his public professions, the character of his particular trade or the manner of conducting it, he is to be fairly understood as holding himself out to the public as ready to carry for hire.

Sec. 91. (§ 78.) Same subject—Illustrations.—A ferryman, whose ordinary employment is merely to carry passengers and their baggage across streams, would not be liable for the loss of money intrusted to his servants for carriage without his knowledge. And so of the owners of stage-coaches, whose business is limited to the transportation of passengers and their baggage; and of the owners of wagons, engaged as carriers of such goods as they are in the habit of carrying; or of steamboats, employed in the business of carrying passengers and merchandise; unless it be shown that the usage of such carriers has been to accept money or the like for carriage. "In all these cases the nature and extent of the employment or business which is authorized by the owners, on their own account and at their own risk, and which, either expressly or impliedly, they hold themselves out as undertaking, furnish the true limits of their rights, obligations, duties and liabilities. The question, therefore, in all cases of this sort, is, What are the true nature and extent of the employment and business in which the owners hold themselves out to the public as engaged?" [22]

So a railroad company which does not undertake to carry dogs cannot be held liable as a common carrier to one whose dog was carried in violation of the rule and by virtue of a special agreement with the baggage-master.[23] And a railroad company is not liable as a common carrier to a person whose

22. Per Story, J., in Citizens' Bank *v.* The Nantucket S. B. Co., 2 Story, 33.

23. Honeyman *v.* Railroad, 13 Oreg. 352. But company is liable where dogs are permitted to be carried as "baggageman's perquisites." Cantling *v.* Railroad Co., 54 Mo. 385.

letter has been lost in the mail which the company had undertaken to carry by contract with the government.[24]

Sec. 92. (§ 79.) How when possession of goods not taken —Towing boats.—The goods must also be delivered into the actual custody of the carrier; and if they be of such a character that the service which he is employed to perform in respect to them does not require their actual possession and no such actual possession is taken, there is no such bailment as is necessary to make him a common carrier. Thus, the owners of a steamboat employed in the towing of other boats or vessels do not incur the responsibility of common carriers as to the tow. The exercise of reasonable care and skill in conducting the business of the towage to its destination is the extent of their obligation.[25] "It is a misnomer," said Bronson, J., in Wells *v.* The Steam Navigation Company,[26] "to call the defendants common carriers, or carriers of any kind, in relation to the business of towing boats. Nor are they bailees of any description; for the property towed is not delivered to them, nor placed within their exclusive custody or control. It remains in the possession, and, for most purposes, in the exclusive care, of the owners or their servants. There is no bailment within any definition of that term to be found in the books. But, whether a bailment or not, it is clear that those who tow boats and vessels are not common carriers of the things towed."[27] But if the proprietor of a towboat, on cer-

24. Central Railroad *v.* Lampley, 76 Ala. 357.

25. The Mayor, Aldermen and Burgesses of the Borough of Preston *v.* Biornstad *et al.*, L. R. (1898) App. Cas. 513.

26. 2 Coms. 208.

27. The weight of authority is very decidedly in favor of the law as thus stated. There are, however, cases in which a different view is taken of the character of the towing vessel. In Pennsylvania and New York, the cases are numerous and uniform to the effect that towing vessels are not common carriers as to the tow, but incur only the responsibility of ordinary bailees for hire. Hayes *v.* Millar, 77 Penn. St. 238; Brown *v.* Clegg, 63 *id.* 51; Leonard *v.* Henrickson, 18 *id.* 40; Hayes *v.* Paul, 51 *id.* 134; Merrick *v.* Brainard, 38 Barb. 574; The Arctic Fire Ins. Co. *v.* Austin, 54 *id.* 559; Alexander *v.* Green, 3 Hill, 9; 7 *id.* 533; Caton *v.* Rumney, 13 Wend. 387; Wells *v.* Steam Nav.

tain trips when he has no towing to do, holds himself out as being ready and willing to carry for all who apply, he will be considered for the time being as acting in the capacity of a common carrier.[28]

Sec. 93. (§ 80.) Passenger carriers not common carriers of persons.—For obvious reasons which will be hereafter stated,

Co., 2 Com. 204; 4 Seld. 375; Emilivsen *v.* Railroad Co., 51 N. Y. Supp. 606, 30 App. Div. 203.

This position is sustained by many authorities elsewhere. Varble *v.* Bigley, 14 Bush, 698; Transportation Line *v.* Hope, 95 U. S. 297; The Steamer New Philadelphia, 1 Black, 62; The Steamer Webb, 14 Wall. 406; The Lyon, 1 Brown's Adm. 59; The Stranger, *id.* 281; The Oconto, 5 Biss. 460; The Merrimac, 2 Sawyer, 586; Sproul *v.* Hemmingway, 14 Pick. 1; The Pennsylvania, etc., Nav. Co. *v* Dandridge, 8 Gill & J. 248; The Steamboat Angelina Corning, 1 Ben. 109; The Princeton, 3 Blatch. 54; Abbey *v.* Str. Stephens, 22 How. Pr. 78; The Neaffie, 1 Abb. U. S. Rep. 465; Brawley *v.* Watson, 2 Bond. 356; Story on Bail. § 496; The Quickstep, 9 Wall. 665; Wooden *v.* Austin, 51 Barb. 9; The Margaret, 94 U. S. 494; The Nettie Quill, 124 Fed. 667; Knapp, Stout & Co. *v.* McCaffery, 178 Ill. 107, 52 N. E. Rep. 898, 69 Am. St. Rep. 290, *affirming s. c.* 74 Ill. App. 80.

This is also the law of the English courts. Symonds *v.* Pain, 6 Hurl. & N. 709; The Minnehaha, 1 Lush. 335; The Julia, 14 Moore P. C. 210; The Mayor, Aldermen and Burgesses of the Borough of Preston *v.* Biornstad *et al.*, L. R. (1898), App. Cas. 513, *affirming s. c.* (1897) P. 118.

But the question has been settled the other way in Louisiana. Bussey *v.* The Trans. Co., 24 La. Ann. 165; Clapp *v.* Stanton, 20 La. Ann. 495; Smith *v.* Pierce, 1 La. 350. And opinions favorable to this view of it have been expressed in White *v.* Mary, 6 Cal. 462; Walston *v.* Myers, 5 Jones, N. C. 174; and by Chancellor Kent in 2 Com. 599.

In Ashmore *v.* The Steam Towing Co., 4 Dutcher, 180, the court was divided upon the question.

Where the employment consists in towing for short distances without taking the exclusive control or possession of the tow, it would seem to be plain that it could not have entered into the contemplation of the parties that such an extraordinary liability as that of the common carrier should attach to the towing vessel. But where the absolute control and management of the tow is given to it especially if for a long voyage, as is frequently the case with barges and other river craft upon our western rivers, the towing steamer being in such a case solely responsible for the management of its tow, it would seem to be a question of considerable doubt whether the towing vessel should not be held liable as a common carrier. This distinction was noticed in Bussey *v.* The Trans. Co., and in Ashmore *v.* The Trans. Co., *supra.*

28. Bassett & Stone *v.* Mining Co., — Ky. —, 88 S. W. Rep. 318.

carriers of passengers are not common carriers as to the persons of those whom they carry. But the two employments of carrying passengers and goods are almost universally combined or engaged in by the same carriers; and, as we have already seen, carriers of passengers become common carriers as to the baggage of their passengers. So that it may be said that no carrier is exclusively a carrier of passengers, the carriage of the passenger necessarily implying the carriage of his baggage, as to which the carrier incurs the liability of the common carrier.[29]

Sec. 94. (§ 81.) Postmasters, mail contractors and carriers not common carriers.—Postmasters, mail contractors and mail carriers, as has been often decided, are not common carriers as to such things as may be sent and carried through the mails, and they owe no duty either to the sender or addressee of such matter. They are made the instruments of government for the performance of acts in execution of functions assumed and controlled by it, and their contracts are with the government and not with the individuals who derive the benefit of their services. They receive their compensation from the government, and, at most, are public agents discharging public duties, and therefore owe no duty as common carriers to those who receive the benefit of their services.[30] So a railroad company carrying mail in pursuance of a contract with the government is neither a private nor a common carrier as to such mail.[31]

Sec. 95. (§ 81a.) Telegraph and telephone companies not common carriers.—Nor by the weight of authority can telegraph and telephone companies be considered as common carriers, although the attempt has been repeatedly made to put

29. See *ante*, § 69.

30. Story on Bail. § 463; Schroyer *v.* Lynch, 8 Watts, 453; Dunlop *v.* Munroe, 7 Cranch. 242; Conwell *v.* Voorhees, 13 Ohio, 523; Wiggins *v.* Hathaway, 6 Barb. 632; Lane *v.* Cotton, 1 Ld. Raym. 646.

31. Central Railroad *v.* Lampley, 76 Ala. 357; Boston Ins. Co. *v.* Railway Co., 118 Iowa, 423, 92 N. W. Rep. 88, 59 L. R. A. 796; German State Bank *v.* Railway Co., 113 Fed. 414; Bankers' Mut. Casualty Co. *v.* Railroad, 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397; *petition for writ of certiorari denied*, 187 U. S. 648.

them upon the same footing as to liability for miscarriage.[32] Some courts have, however, termed them common carriers of messages and common carriers of intelligence.[33] And in the case of Telegraph Co. *v.* Texas,[34] in the United States supreme court, Chief Justice Waite said: "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods." And,

32. Leonard *v.* The Telegraph Co., 41 N. Y. 544; Tyler *v.* The West. U. Tel. Co., 60 Ill. 421; Breese *v.* The U. S. Tel. Co., 48 N. Y. 132; Western Union Tel. Co. *v.* Carew, 15 Mich. 525; Telegraph Co. *v.* Griswold, 37 Ohio St. 301; Hibbard *v.* Telegraph Co., 33 Wis. 558; Western U. Tel. Co. *v.* Reynolds, 77 Va. 173; Kiley *v.* Telegraph Co., 109 N. Y. 231; Grinnell *v.* Telegraph Co., 113 Mass. 299; Western U. Tel. Co. *v.* Munford, 87 Tenn. 190; Marr *v.* Telegraph Co., 85 Tenn., 529; Gillis *v.* Telegraph Co., 61 Vt. 461; Fowler *v.* Telegraph Co., 80 Me. 381. Telegraph messenger company is not a common carrier. Feiber *v.* Tel. Co., 21 Abb. N. C. 11.

Telegraph companies, in the absence of statute, are not common carriers, and may limit their liability except for gross or willful negligence. Birkett *v.* Telegraph Co., 103 Mich. 361, 61 N. W. Rep. 645, 50 Am. St. Rep. 374.

33. Central Telephone Co. *v.* Bradbury, 106 Ind. 1; State *v.* Telephone Co., 17 Neb. 126; Chesapeake, etc., Tel. Co. *v.* Telegraph Co., 66 Md. 399; Louisville, etc., Co. *v.* Telegraph Co., 24 Am. L. Reg. 579; Shearman & Redfield on Negligence, secs. 534, 535; Gwynn *v.* Telephone Co., 69 S. Car. 434, 48 S. E. Rep. 460; Pacific Telegraph Co. *v.* Underwood, 37 Neb. 315, 55 N. W. Rep. 1057, 40 Am. St. Rep. 490; State *v.* Telephone Co., 114 Tenn. 194, 86 S. W. Rep. 390.

Telegraph companies which make an offer to the public to carry telegraphic messages, are by statute, common carriers. Kirby *v.* Telegraph Co., 4 S. D. 105, 55 N. W. Rep. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612.

A private corporation, engaged in operating a telephone plant, is a common carrier of news and intelligence, and is therefore amenable to the provisions of the state statute which provides that all charges made for any service rendered, or to be rendered, by common carriers, shall be reasonable and just. Such a public service corporation is charged with certain public duties, among which are to furnish for a reasonable compensation to any citizen a telephone and telephonic service, and to charge each patron for the service rendered the same price it charges every other patron for the same service under substantially the same or similar conditions. The legislature has the power to say what compensation such a public service corporation may exact. Nebraska Telephone Co. *v.* State, 55 Neb. 627, 76 N. W. Rep. 171, 45 L. R. A. 113.

34. 105 U. S. 460.

certainly, though they cannot be regarded strictly as common carriers in the sense which the phrase "common carrier" had previously juridically acquired, yet in their relations to the public, in their duty to serve all impartially, in their duty to avoid discrimination, if not in their responsibility for accurate transmission of messages they occupy a position very closely analogous to that of common carriers.

Sec. 96. Livery stable keepers are not common carriers.—Ordinarily, livery stable keepers, engaged in the business of letting for hire teams and vehicles, either with or without drivers, are not carriers of passengers within the legal meaning of that term. They do not hold themselves out as undertaking for hire to carry indiscriminately any person who may apply. Those who hire their vehicles are not necessarily restricted to vehicles or drivers designated by the proprietor, but may, in a measure, protect themselves by selecting the particular horse or driver they wish to hire. The duties and obligations of carriers of passengers are, therefore, not applicable to mere livery stable keepers.[35]

Sec. 97. Messenger companies.—To the extent that a telegraph company offered its services to the public as a carrier of packages, such packages being carried by messenger boys furnished by the company, it was held that the company was a

35. Stanley *v.* Steele, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561; Copeland *v.* Draper, 157 Mass. 558, 32 N. E. Rep. 944, 34 Am. St. Rep. 314, 19 L. R. A. 283; Erickson *v.* Barber Bros., 83 Iowa, 367, 49 N. W. Rep. 838; Siegrist *v.* Arnot, 86 Mo. 200, 56 Am. Rep. 424.

A livery stable keeper who lets his team and vehicle, accompanied by a driver of his own selection, for hire, to go upon a particular journey, is not a carrier of passengers and does not assume the duties and obligations of such a carrier. He is, at most, a private carrier for hire, and is required to exercise the same measure of skill and care which is applied to a person engaged in any special pursuit in which he undertakes to perform services for others for compensation. Such a person undertakes to possess the skill adequate to the undertaking, and promises to exercise due diligence and care in its performance. But ordinary skill, diligence and prudence is all that the law exacts; that is, the exercise of such care and skill as prudent men, experienced in the business, are accus-

common carrier.[36] But where a company engaged in the business of furnishing messengers for hire, such messengers for the time being being under the control and direction of the persons engaging their services, it was held that the messenger company was not, as to the articles carried, a common carrier.[37]

Sec. 98. (§ 81b.) Log-driving companies not common carriers.—So log-driving and booming companies organized for the purpose of driving, running, rafting and booming logs are not common carriers of the logs delivered to them for that purpose.[38]

Sec. 99. (§ 81c.) Drovers and agisters not common carriers.—For like reasons, drovers and agisters employed to drive cattle and other animals are held not to be common carriers.[39]

Sec. 100. (§ 81d.) Owners and managers of passenger elevators.—The owners and managers of passenger elevators, although spoken of by some courts as common carriers of passengers, cannot properly be so classed. The public carrier of passengers, on account of the nature of his employment, is charged in law with certain duties owed to the public among which is that of receiving upon his vehicles all who may offer themselves for transportation, and who stand ready to pay the legal fare and comply with his reasonable rules and regulations. When the nature of the business of operating a passenger elevator is considered, it is clear that the proprietor owes no such duty to the public and is therefore not a carrier of passengers in the full sense of the term as legally understood.[40] Nevertheless, with reference to the safety of their passengers, the law has imposed upon the

tomed to use under similar circumstances. Payne *v.* Halstead, 44 Ill. App. 97.

36. Gilman *v.* Telegraph Co., 95 N. Y. Supp. 564, 48 Misc. 372. But see, *contra*, Hirsch *v.* Telegraph Co., 98 N. Y. Supp. 371.

37. Haskell *v.* Boston, etc., Messenger Co., — Mass. —, 76 N. E. Rep. 215.

38. Mann *v.* White River, etc., Co., 46 Mich. 38.

39. Angell on Carriers, §§ 24, 52; Story on Bailments, § 443.

40. Seaver *v.* Bradley, 179 Mass. 329, 60 N. E. Rep. 795, 88 Am. St. Rep. 384.

proprietors of passenger elevators duties precisely similar to those exacted of passenger carriers by railroad. The safety and lives of those who avail themselves of this means of carriage must of necessity be intrusted in a great measure to the care of those who control and operate the cars. The law, therefore, justly holds that while the owners of passenger elevators are not insurers of the safety of their passengers, they are bound to exercise in their behalf the highest degree of skill and foresight, or, as some courts have expressed it, the utmost human care and foresight consistent with the efficient use and operation of the means of conveyance employed.[41]

41. Goodsell *v.* Taylor, 41 Minn. 207; Bullock *v.* Butler Exchange Co., 22 R. I. 108, 46 Atl. Rep. 273; Treadwell *v.* Whittier, 80 Cal. 575, 22 Pac. Rep. 266, 13 Am. St. Rep. 175; Hartford Deposit Co. *v.* Sollitt, 172 Ill. 222, 50 N. E. Rep. 178, 64 Am. St. Rep. 35, affirming 70 Ill. App. 166; Springer *v.* Ford, 189 Ill. 430, 59 N. E. Rep. 953, 82 Am. St. Rep. 464, 52 L. R. A. 930; Chicago Exchange Bldg. Co. *v.* Nelson, 197 Ill. 334, 64 N. E. Rep. 369; Springer *v.* Schultz, 205 Ill. 144, 68 N. E. Rep. 753, *affirming* 105 Ill. App. 544; Field *v.* French, 80 Ill. App. 78; Western Union Telegraph Co. *v.* Woods, 88 Ill. App. 375; Winheim *v.* Field, 107 Ill. App. 145; Morgan *v.* Saks, — Ala. —, 38 So. Rep. 848; Lee *v.* Knapp & Co., 155 Mo. 610, 56 S. W. Rep. 458; Becker *v.* Lincoln Real Estate & Bld. Co., 174 Mo. 246, 73 S. W. Rep. 581; Luckel *v.* Century Bld. Co., 177 Mo. 608, 76 S. W. Rep. 1035; Goldsmith *v.* Bld. Co. — Mo. App. —, 83 S. W. Rep. 1112; McGreil *v.* Buffalo Office Bld. Co., 153 N. Y. 265, 47 N. E. Rep. 305; Russo *v.* Morris, etc., Imp. Assn., 104 La. 426, 29 So. Rep. 46; Phillips *v.* Pruitt, 26 Ky. Law Rep. 831, 82 S. W. Rep. 628; Burgess *v.* Stowe, 134 Mich. 204, 96 N. W. Rep. 29; Edwards *v.* Burke, 36 Wash. 107, 78 Pac. Rep. 610; Bremer *v.* Pleiss, 121 Wis. 61, 98 N. W. Rep. 945; Oberndorfer *v.* Pabst, 100 Wis. 505, 76 N. W. Rep. 338; Fox *v.* City of Philadelphia, 208 Penn. St. 127, 57 Atl. Rep. 356, 65 L. R. A. 214; Fox *v.* Philadelphia, 208 Penn. St. 127, 57 Atl. Rep. 356, 65 L. R. A. 214; Stix, — Mo. —, 88 S. W. Rep. 108; Shellaberger *v.* Fisher, — C. C. A. —, 143 Fed. 937.

The liability of the owner or manager of a freight elevator as a carrier of passengers is measured by the same rules, and he is held to the same degree of diligence as persons owning and operating passenger elevators. Springer *v.* Ford, 189 Ill. 430, 59 N. E. Rep. 953, 82 Am. St. Rep. 464, 52 L. R. A. 930.

But see, Edwards *v.* Bld. Co., — R. I. —, 61 Atl. Rep. 646, and Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. Rep. 925, 82 Am. St. Rep. 630, 52 L. R. A. 922, *reversing* 62 N. Y. Supp. 364, 47 App. Div. 70, where it is said that the owners

And this measure of care applies as well to the selection of competent operators as to the operation of the machinery and cars.[42]

Sec. 101. Same subject—Must allow passengers reasonable time to enter or leave car.—The rules regulating the care to be exercised by railroads in allowing their passengers a reasonable time to enter or leave their cars in safety apply with equal, if not more reason and force, to the operation of passenger elevators, since the danger of starting before the passenger has boarded or left an elevator car is even greater than the danger of starting a train under similar circumstances. The

of elevators are not common carriers and bound to use the utmost human care and foresight, but are required only to use reasonable care in the character of the appliance they provide, and in its maintenance and operation.

Evidence that an elevator stopped at a floor where a passenger was killed, without the floor being called, and that it was started before the door was closed, is sufficient to justify the submission of the question of the defendant's negligence to the jury. Masonic, etc., Assn. *v.* Collins, 210 Ill. 482, 71 N. E. Rep. 396.

Leaving the door of a passenger elevator shaft open and unguarded, so that persons taking the usual course to enter the elevator car are liable to fall down the shaft, is negligence. Haymarket Theatre Co. *v.* Rosenberg, 77 Ill. App. 183.

But it is not negligence to permit a movable stool to remain in the elevator for the use of the operator. Gibson *v.* International Trust Co., 186 Mass. 454, 72 N. E. Rep. 70.

Nor is it actionable negligence on the part of the owner of an elevator where, on account of someone having moved the stool of the operator, the operator, in attempting to sit down, loses his balance, catches the apparatus that moves the elevator and sends it down, thereby injuring a passenger. Gibson *v.* International Trust Co., 177 Mass. 100, 58 N. E. Rep. 278, 52 L. R. A. 928.

If the passenger be chargeable with contributory negligence, he will be barred from a recovery. Blackman *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. Rep. 28; Green *v.* Y M. C. A., 65 Ill. App. 459.

In an action by a newsboy for injuries sustained on a passenger elevator, it is competent to show that he had been warned to keep off the elevator before the happening of the injury; if such were proven, he would be entitled only to the degree of care due a trespasser, Springer *v.* Byram, 137 Ind. 15, 36 N. E. Rep. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244.

42. Fox *v.* City of Philadelphia, 208 Penn. St. 127, 57 Atl. Rep. 356, 65 L. R. A. 214.

operator, therefore, must exercise a high degree of care in allowing passengers a reasonable time to enter or leave the car before putting it in motion, and when a passenger is leaving it at any particular floor, to hold it there a reasonable time, not only for him, but for any other passenger in the act of alighting, to do so in safety.[43]

Sec. 102. Same subject—When negligence will be presumed. —As a general rule, the mere happening of an accident resulting in injury to the passenger while riding in a passenger elevator is not, of itself, *prima facie* evidence that the owner or his agent has been at fault, and the plaintiff must allege and prove the facts upon which he relies to establish negligence.[44] But where the accident is caused by the breaking or giving way of the machinery or appliances by which the elevator is operated, the very nature of such an occurrence raises a presumption of negligence which can only be overcome by proof that the requisite care and caution was exercised.[45] And although the operation of an automatic push-button, electrical passenger elevator may not be negligence in respect to persons of sufficient maturity and discretion to appreciate the danger and risk of contact with the door or side of the shaft when the car is moving, yet it may be actionable negligence towards a

43. Becker *v.* Lincoln Real Estate & Bld. Co., 174 Mo. 246, 73 S. W. Rep. 581; Luckel *v.* Century Bld. Co., 177 Mo. 608, 76 S. W. Rep. 1035; Becker *v.* Building Co., — Mo. App. —, 93 S. W. Rep. 291.

Starting an elevator while the door is open, and while a passenger is entering the car, is negligence. Blackwell *v.* O'Gorman Co., 22 R. I. 638, 49 Atl. Rep. 28.

If an elevator car be started at full speed before a passenger has had time to place himself securely on his feet, and he is thereby injured, the proprietor will be liable. Russo *v.* Morris, etc., Imp. Assn., 104 La. 426, 29 So. Rep. 46.

44. Spees *v.* Boggs, 198 Penn. St. 112, 47 Atl. Rep. 875, 82 Am. St. Rep. 792.

45. Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. Rep. 925, 82 Am. St. Rep. 630, 52 L. R. A. 922; Hartford Deposit Co *v.* Sollitt, 172 Ill. 222, 50 N. E. Rep. 178, 64 Am. St. Rep. 35; Franklin Printing & Publishing Co. *v.* Behrens, 181 Ill. 340, 54 N. E. Rep. 896; Springer *v.* Ford, 189 Ill. 430, 59 N. E. Rep. 953, 82 Am. St. Rep. 464, 52 L. R. A. 930; Springer *v.* Schultz, 205 Ill. 144, 68 N. E. Rep. 753; Winheim *v.* Field 107 Ill. App. 145; Edwards *v.* Bld. Co., — R. I. —, 61 Atl. Rep. 646.

child of tender years who cannot appreciate his danger, and the mere happening of an accident to such a child on an elevator of that description where no operator is employed constitutes rebuttable evidence of negligence.[46]

Sec. 103. (§ 81e.) Bridge, canal and turnpike companies. —Bridge,[47] canal,[48] and turnpike[49] companies organized merely for the purpose of furnishing a thoroughfare over which others may transport goods, but not engaged in such transportation themselves, are not common carriers.

46. Shellaberger *v.* Fisher, — C. C. A. —, 143 Fed. 937.

47. Kentucky, etc., Bridge Co. *v.* Railroad Co., 37 Fed. Rep. 616; Grigsby *v.* Chappell, 5 Rich. 443.

48. Exchange Ins. Co. *v.* Canal Co., 10 Bosw. 180.

49. Lake Superior, etc., R. Co. *v.* United States, 93 U. S. 444.

CHAPTER IV.

OF THE DELIVERY TO THE CARRIER, AND THE EVIDENCE THEREOF.

§ 104. In general.

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218. Enforcement of limitation valid at place of contract, invalid at destination, and invalid at forum.

219. Enforcement of limitation valid at place of contract, valid at destination and invalid at forum.

220. Enforcement of limitation invalid at place of contract, valid at destination and valid at forum.

221. Enforcement of limitation invalid at place of contract, invalid at destination and valid at forum.

222. Enforcement of limitation invalid at place of contract, valid at destination and invalid at forum.

223. Enforcement of limitation invalid at place of contract, invalid at destination and invalid at forum.

224. Proof must be made of what foreign law is.

Sec. 104. (§ 81f.) In general.—In considering the question of the carrier's liability in relation to the goods, two questions become important at the outset: (1) Have the goods been de-

livered to the carrier for transportation; and (2) What evidence, receipt or contract exists or is necessary in regard to such delivery. These two questions form the subject of the present chapter and will be separately considered.

I. OF DELIVERY TO THE CARRIER.

Sec. 105. (§ 82.) The delivery must be complete.—The duties and obligations of the common carrier with respect to the goods commence with their delivery to him; and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods.[1] It must rest entirely upon the one or the other; and until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them. They must be delivered to the carrier himself, or to some agent of his, authorized to receive them on his behalf. The mere deposit of them in the yard of an inn from which the carrier starts, without leaving them in charge of some servant of the carrier, is not sufficient.[2] Nor will it be enough for the owner to put them into the carrier's vehicle without his knowledge.[3] They must be put into the actual custody of the carrier or of his servants. Thus, where the owner of the goods, having previously given notice to a railroad agent of his intention to send the goods and having paid him the freight, sent them by his servant to the depot, where they were put upon the railroad platform and the attention of the baggageman called to them, but no notice given to the freight agent, it was held that there had been no delivery, and that the railroad company was not liable for damage done to them by a passing train.[4] So where a per-

1. Brind *v.* Dale, 8 Car. & P. 207; Railway Co. *v.* Murphy, 60 Ark. 333, 30 S. W. Rep. 419, 46 Am. St. Rep. 202, citing Hutchinson on Carr.; Railway Co. *v.* McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944, citing Hutchinson on Carr.

2. Selway *v.* Holloway, 1 Ld. Raym. 46; Buckman *v.* Levi, 3 Camp. 414.

3. Leigh *v.* Smith, 1 Car. & P. 638.

4. Grosvenor *v.* The Railroad, 39 N. Y. 34.

son intending to take the train, if certain funds arrived in time, went to the depot and deposited her trunk and box on the platform, but, when the train arrived, instructed the company's servants not to put them on the train as she did not intend to take it, and went away after asking permission to leave the things there till she got ready to go, it was held that the trunk and box had not been delivered to the railroad company for carriage, and that the company was therefore not liable as a common carrier for their loss.[5] So where hogs which the owner desired to have transported were, when the train arrived by which he wished them to go, still in a private yard and had yet to be loaded, counted and receipted for, they were held not to be so far delivered to the railroad company as to make it liable for delay in shipping.[6] So goods stored along the line awaiting shipment, where the owner is to load them when he can get the necessary cars, are not completely delivered to the railroad company until they are so loaded and ready for shipment.[7] And cotton, still in the possession of a compress company, for which the railroad company has as yet given no bill of lading, and of which it has neither the actual or constructive possession nor the custody or control, is not yet delivered to the railroad company for carriage, and the latter is not liable as a carrier to the owner for its loss, though it has not furnished cars for its transportation as rapidly as it had agreed with the compress company to do.[8]

Sec. 106. (§ 83.) Delivery may be made to carrier's agent. —Where the carrier places a person in charge of the business at a certain depot, and holds him out to the public as being qualified with the requisite authority to receive goods for shipment, a delivery to, and an acceptance by him of the goods,

5. Little Rock, etc., R'y Co. *v.* Hunter, 42 Ark. 200.

6. Frazier *v.* Railroad Co., 48 Iowa, 571.

7. Wilson *v.* Railroad Co., 82 Ga. 386.

8. St. Louis, etc., R'y Co. *v.* Insurance Co., 139 U. S. 223, 11 Sup. Ct. Rep. 554; Arthur *v.* Railway Co., 139 Fed. 127, citing Edwards & Co. *v.* Railroad Co. (Tex. Civ. App.), 81 S. W. 800; Martin *v.* Railway Co., 55 Ark. 510, 19 S. W. Rep. 314. See, also, Atlantic Natl. Bank *v.* Railway, 106 Fed. 623.

will be a delivery to the carrier. In the case of Rogers *v.* The Railroad,[9] the owner of a trunk sent it to the defendants' depot by an expressman, who placed it within the inclosure of the depot beside the baggage crate, which was locked, and then went into the ticket-office and informed the ticket agent of the fact, who replied "all right;" and it was held that the case should have gone to the jury upon the question of delivery, the court saying that it was enough to establish a delivery, in the first instance, to prove that a person acting as the agent of the company, received and accepted the property for transportation, even if there should be, in fact, another person having charge of the business of receiving freight. "The ticket agent," said the court, "was apparently in charge of the depot. The company which sanctions his employment and thus holds him out to the world as its agent is not at liberty to repudiate his acts."[10]

Sec. 107. (§ 84.) Not sufficient when made to agent not authorized to receive it.—A delivery, however, to an employe whose employment is such as to negative a reasonable belief in the owner's mind that he has authority to receive goods for shipment will not be a delivery to the carrier, unless it can be shown that such an employe was, in fact, authorized to receive the goods. Thus, delivery to one of the crew or deck hands of a steamboat is not good delivery although made upon the boat, and will not bind the owner of the boat as a carrier. Where the goods were taken on board and put down by a porter in a certain spot by direction of one who was a deck hand employed to sweep the deck, and it was proven that the clerk of the boat was the only authorized person to receive freight and give receipts for it, a majority of the court were of the opinion

9. 2 Lans. 269.

10. A passenger upon a railroad train is justified in regarding the man whom he sees handling the baggage as the agent of the company and in giving him directions as to the disposition to be made of his baggage. Ouimit *v.* Henshaw, 35 Vt. 605. So a delivery to a person apparently employed in a freight office, who receives and receipts for the goods in the presence and with the knowledge of the agent, who does not object, is a good delivery to the carrier. Harrell *v.* Railroad, 106 N. C. 258.

that, as the deck hand was not the agent of the boat for the purpose of receiving freight, the owners had incurred no liability. But some of the judges were of a different opinion, upon the ground that the porter had a right to presume that the deck hand had been left in charge by the proper officers of the boat.[11] And, in another case, it was held that to make a delivery to a deck hand good as against the owners of a boat, it must be shown that he was authorized to receive freight, or that it was delivered to him in pursuance of some special contract or usage.[12]

Sec. 108. (§ 84a.) Delivery to carrier by agent of shipper.—The delivery to the carrier or his agent may be made not only by the shipper in person, but also by his authorized agent. Where the owner of goods places them in the hands of an agent to secure their transportation by a carrier, the latter, in the absence of a known limitation upon the agent's authority, is justified in considering the agent authorized to exercise all the powers necessary to effect the purpose of the agency,[13] and the acts of the agent in that respect will be binding upon the principal, as in giving directions as to the time or manner of shipment or the terms and conditions upon which the transportation is to be undertaken.[14]

Sec. 109. (§ 85.) No delivery when owner retains custody—Passenger retaining custody of baggage.—If the owner, traveling as the carrier's passenger, retain the custody of his baggage instead of delivering it to the carrier or his servant, he thereby assumes the responsibility and cannot hold the carrier liable for the loss of it, unless the loss should occur from

11. Trowbridge *v.* Chapin, 23 Conn. 595.

12. Ford *v.* Mitchell, 21 Ind. 54. And see Leigh *v.* Smith, 1 Car. & P 638, and *post*, §§ 115-118.

13. See Mechem on Agency, § 311.

14. See *post*, § 457; Nelson *v.* Railroad, 48 N. Y. 498; London *v.* Railway, 7 H. & N. 600; Lewis *v.* Railway, 5 H. & N. 867; Squire *v.* Railroad, 98 Mass. 239; York Co. *v.* Railroad, 3 Wall. 113; Jennings *v.* Railway, 52 Hun. 227.

In Hayes *v.* Campbell, 63 Cal. 143, it is held that knowledge on the part of the carrier that the person effecting the carriage was but an agent for others was sufficient to put the carrier on inquiry

the negligence or fault of the carrier; in which event he would be liable, not as a common carrier, but as an ordinary bailee for hire. As where the passenger placed his overcoat upon his seat in the cars instead of delivering it to a servant of the company, and forgot to take it with him when he left the car, and it was stolen, it was held that the railway company was not liable for the loss.[15] Or if, being a passenger upon a steamboat, he retain the possession of his baggage, the carrier cannot be made responsible for the loss.[16]

Sec. 110. (§ 86.) Same subject.—In such cases the owner so far from having made delivery to the carrier, has purposely withheld it. He has not trusted the carrier; and where there has been no trust reposed there can be no liability, for trust is the very basis of the liability; and it has been expressly held that if the owner of goods especially undertake to watch them, and, refusing to place confidence in the carrier, send his own servant along in charge of them, and the carrier is thereby induced to neglect his usual precaution, this negatives a bailment and no liability will exist.[17] But the owner may accompany the goods and have an eye upon them, or he may send his servant with them to look after them; but the carrier must have the entire custody and control of them. Otherwise he will not be liable for their safety.[18]

Sec. 111. (§ 87.) Place at which delivery must be made.—But it is not necessary in all cases to make the delivery to the carrier at the place appointed by him, or at his office or place of business, provided the delivery be made to a person who is authorized to receive the goods. Delivery to the agent of a

in ascertaining the extent of the agent's powers, and that the owners could not be bound by a rate agreed upon with the agent in excess of his authority.

15. Tower *v.* Railroad, 7 Hill, 47.

16. Cohen *v.* Frost, 2 Duer, 335. This subject of the liability of the carrier for the passenger's baggage will be more particularly treated of hereafter. Chapter XIII.

17. East India Company *v.* Pullen, 2 Strange, 690.

18. Robinson *v.* Dunmore, 2 Bos. & P. 416; Hollister *v.* Nowlen, 19 Wend. 234; Willoughby *v.* Horridge, 74 Eng. C. L. R. 742; Brind *v.* Dale, 8 Car. & P. 207; Cohen *v.* Frost, 2 Duer, 335.

stage company has, consequently, been held good although not made at the office of the company.[19] But delivery to the driver, not at the company's office and without notice to it and without its assent, has been held not to be a good delivery, the driver not being the authorized servant of the company for that purpose.[20] It may be shown, however, that such was the usage known to the company and recognized by it.[21] And the driver of a coach may make the company liable as a common carrier for the baggage of a passenger taken on anywhere upon the route. And where the company is a carrier of goods as well as of passengers, he may receive such goods for carriage at any point upon the route at which there is no office or agent; for, in the absence of express directions to the contrary known to the owner of the goods, the law will imply the authority. But the delivery, if made away from the office or place of business of an express company, must be made to an agent and not to an agent's assistant or clerk temporarily appointed by him. Such an assistant, it is said, may officiate for the agent at his office, and his receipt will be valid even in the absence of the agent, because that would be a delivery at the office or at the appointed place of business of the principal; but such a delivery out of the office or away from it would be unauthorized and would not bind the principal.[22]

Sec. 112. (§ 88.) Must be for immediate transportation.—The delivery must be to the carrier or his agent for immediate

19. Phillips *v.* Earle, 8 Pick. 182.

20. Blanchard *v.* Isaacs, 3 Barb. 388.

21. See *post*, § 115.

22. Cronkite *v.* Wells, 32 N. Y. 247. And see Southern Ex. Co. *v.* Newby, 36 Ga. 635.

But in Witbeck *v.* Schuyler, 44 Barb. 469, delivery of a trunk to the captain of a steamboat was held sufficient, although the company to which the boat belonged had an agent in the same place, whose business it was to make contracts for freight, and although it was shown that the captain was only to navigate the boat, it not appearing that the shipper had knowledge of such an arrangement; and the decision was put upon the ground that the principal should be held responsible for the acts of his agent performed within the scope of the apparent authority which the principal allows him to assume.

Where, however, a shipment was made upon a steamboat to be car-

transportation; for, if the goods are delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until something further is done to prepare them for transportation, or until further orders are received from the owner, the carrier becomes a mere depositary or bailee until the appointed time has expired or the other contingency happened upon which the carriage is to commence, or until further orders have been given, as the case may be; for nothing could be more unjust than to permit the owner of the goods to impose upon a mere depositary or warehouseman, whether he has yet become related to the goods as carrier or not, the extremely hazardous responsibility of the common carrier so long as it might suit his interest or convenience to do so.[23] But the moment such orders are given, or such other

ried to the terminus of a distant railroad for further transportation, and it was lost by the steamboat, it was held in a suit against the road that the claim that the boat was the agent of the road must be distinctly proven, and it was intimated that it was doubtful whether the road could constitute an agency so foreign to the purposes of its incorporation. Missouri Coal Co. *v.* The Han., etc., R. R., 35 Mo. 84.

23. Mt. Vernon Co. *v.* Railroad Co., 29 Ala. 296, 8 So. Rep. 687; Barron *v.* Eldredge, 100 Mass. 455; O'Neill *v.* Railroad Co., 60 N. Y. 138; Basnight *v.* Railroad Co., 111 N. Car. 592, 16 S. E. Rep. 323; Dixon *v.* Railway Co., 110 Ga. 173, 35 S. E. Rep. 369; Schmidt *v.* Railway Co., 90 Wis. 504, 63 N. W. Rep. 1057; Railway Co. *v.* Bank, 112 Fed. 861, 50 C. C. A. 558, 56 L. R. A. 546; Railway Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. Rep. 712.

Thus where an initial carrier places a loaded car on the sidetrack of a connecting carrier, without notice to the latter, and without any mark of the name and address of the consignee, or any way-bill or shipping directions, the connecting carrier is only a bailee of the car, and its stringent liability as a common carrier does not attach until such way-bill or directions are given, or until it is informed to what place the car is to be forwarded and to whom delivered. Mt. Vernon Co. *v.* Railroad Co., *supra.*

So where the goods are yet to be graded, classified, marked or set apart from others by the shipper, before they are ready for shipment, they cannot be deemed to be delivered to the carrier for carriage. Iron Mt. Ry. Co. *v.* Knight, 122 U. S. 79.

A common carrier is only liable as such for a passenger's baggage when delivered to it for immediate transportation. If it is brought to the depot for a certain train and on finding that it cannot go until a later train, the passenger leaves it at the depot for such later train,

conditions are fulfilled, the carrier having accepted them with that understanding, his duties and responsibilities as carrier begin.[24]

Sec. 113. (§ 89.) Same subject—When liability begins.—But if the delivery be made at the warehouse or other place of business of the carrier for as early transportation as can be made in the course of the carrier's business, and subject only to such delays as may necessarily occur in awaiting the departure of trains, vessels, or other vehicles of transportation, or from the performance of prior engagements by him, he becomes, the moment the delivery is made, a carrier as to the goods, and his responsibility as such at once attaches.[25] And although there be considerable delay and long storage of the goods until the carrier can secure cars in which to make the shipment, if he receives them solely for transportation, he at once assumes the liability of a common carrier; and it makes

the railroad company is liable in the interim as a warehouseman only. Goodbar *v.* Railway Co., 53 Mo. App. 434.

Where baggage which cannot be checked until a ticket is presented is given to the carrier on Saturday, and no ticket is presented until the following Monday, the carrier in the meantime is liable only as a warehouseman. Murray *v.* Steamship Co., 170 Mass. 166, 48 N. E. Rep. 1093, 64 Am. St. Rep. 290.

24. Railway Co. *v.* Murphy, 60 Ark. 333, 30 S. W. Rep. 419, 46 Am. St. Rep. 202, citing Hutchinson on Carr. See *ante*, § 72.

25. Clark *v.* Needles, 25 Pa. St. 338; Blossom *v.* Griffin, 3 Kern. 569; Wade *v.* Wheeler, 47 N. Y. 658; Michigan R. R. *v.* Shurtz, 7 Mich. 515; Gregory *v.* Railway Co., 46 Mo. App. 574, citing Hutchinson on Carr.; Railway Co. *v.* Murphy, 60 Ark. 333, 30 S. W. Rep. 419, 46 Am. St. Rep. 202, citing Hutchinson on Carr.

Thus, where goods are delivered to a railroad company for transportation at its earliest convenience, nothing further remaining to be done in reference to them by the owner, the company is liable as a common carrier if the goods are burned before shipment. Grand Tower, etc., Co. *v.* Ullman, 89 Ill. 244.

Where goods are properly marked for shipment and placed inside the carrier's freight house with the agreement on the part of the carrier's agent to ship them on the following morning, shipment being delayed until that time because no car is available, the company will be liable as a common carrier while the goods are so awaiting shipment. Meloche *v.* Railway Co., 116 Mich. 69, 74 N. W. Rep. 301.

no difference, it has been said, whether the loading is to be performed by the shipper himself or by the carrier.[26] And the general and well-settled rule is, that the liability of the common carrier commences whenever and as soon as the goods have been delivered to and accepted by him solely for transportation, although they may not be put immediately *in itinere*, but are, at first, for his own convenience and preparatory to the voyage or journey for which they are intended, temporarily deposited in his wharf or store room. In such cases, the deposit is a mere accessary to the carriage, and does not postpone his liability as common carrier to the time when they shall be actually put in motion towards their place of destination.[27] And a delivery to the carrier with the name and address of the consignee marked upon the goods is, in the absence of some directions or agreement otherwise, equivalent to an express direction to transport them to such consignee at once; and the reception of the goods under such circumstances imposes upon him, immediately, the obligation to forward forthwith, and the responsibility of a common carrier,[28] unless the habitual course of dealing between the parties has been otherwise. And so, after the relation of carrier to the goods has become established by their delivery to him for immediate transportation, it may be changed to that of warehouseman by subsequent orders by the owner to delay the forwarding of them. Thus, where the goods had been delivered to the railroad company for shipment, and they were loaded upon its cars for that purpose and were about to be started, but the

26. But when the cars or vehicles are furnished, and a delay in loading them is occasioned by the act of the shipper, and in the meantime the goods are destroyed through no fault of the carrier, the carrier will not be liable. London & L. Insurance Co. *v.* Railroad Co, 144 N. Y. 200, 39 N. E. Rep. 79, 43 Am. St. Rep. 752.

27. Fitchburg, etc., R. R. *v.* Hanna, 6 Gray, 539; Story on Bail. §§ 534, 536; Rogers *v.* Wheeler, 52 N. Y. 262; North German Lloyd S. S. Co. *v.* Bullen, 111 Ill. App. 426; Cooke *v.* Railroad Co., 57 Mo. App. 471, citing Hutchinson on Carr.

28. Witbeck *v.* Holland, 45 N. Y. 13; Shelton *v.* Merchants' Des. Trans. Co., 36 N. Y. S. C. 527; *s. c.*, 59 N. Y. 258; Gregory *v.* Railway Co., *supra*.

company was then requested by the owner to wait until he could see the party to whom he had sold them, which request was complied with; and the next day the goods, while being so detained, caught fire and were damaged, it was held that from the moment the request was made to detain the goods the liability of the company was as warehouseman only.[29]

Sec. 114. Same subject—Live stock placed in yards provided by carrier.—Where the carrier has constructed pens or yards in order to facilitate the loading of live stock, the mere placing of the stock in such pens will not be sufficient to impose upon him the duties and liabilities of a common carrier of live stock.[30] If, however, he receives the stock into the pens or yards thus provided, for the purpose solely of being loaded for transportation, he will thereby assume the obligation of forwarding the stock in the usual way, and his liability as a common carrier will attach at the time the stock is so received.[31] But if the stock, while in the carrier's pens or yards awaiting transportation, is subject to the right of the shipper to remove it when necessary for food and water, it has been held that the carrier's liability will be no greater than that of an ordinary bailee, and that he will be liable only where he has failed to exercise ordinary care.[32]

Sec. 115. (§ 90.) Constructive delivery—Place fixed by agreement or usage.—But, while it is the undoubted general

29. St. Louis, etc., R. R. *v.* Montgomery, 39 Ill. 335.

Wood piled up along a railroad track, to be loaded by the owner when he could get the cars, is not completely delivered to the company. Wilson *v.* Railway Co., 82 Ga. 386, citing Wells *v.* Railroad Co., 6 Jones' L. 47, and distinguishing Central R. R. *v.* Hines, 19 Ga. 203; Fleming *v.* Hammond, 19 Ga. 145.

30. Railway Co. *v.* Byrne, 100 Fed. 359, 40 C. C. A. 402.

31. Lackland *v.* Railway Co., 101 Mo. App. 420, 74 S. W. Rep. 505, citing Hutchinson on Carr; Cooke *v.* Railroad Co., 57 Mo. App. 471.

Where cattle have been put into the carrier's pen for immediate shipment, and their loading has begun, the carrier is liable as such. Gulf, etc., R'y. Co. *v.* Trawick, 80 Tex. 270; McCullough *v.* Ry. Co., 34 Mo. App. 23.

32. Railroad Co. *v.* Powers, — Neb. —, 103 N. W. Rep. 678.

rule that the delivery, to bind the carrier, must be made either to him or to some one with authority from him, or who may be rightfully presumed to have such authority, it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage, or by a particular course of dealing between them. They may make such stipulations upon the subject as they see fit, and when such stipulations are made, they, and not the general law, are to govern. If, therefore, the parties agree that the goods may be deposited for transportation at any particular place and without an express notice to the carrier, such deposit will be a sufficient delivery; and proof of a constant and habitual practice and usage of the carrier to receive the goods when they are deposited for him in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties, by which the goods, when so deposited, shall be considered as delivered to him, without any further notice. Such a practice and usage are tantamount to an open declaration, a public advertisement by the carrier, that such a delivery should, of itself, be deemed an acceptance by him; and to permit him to set up, against those who had been thereby induced to omit it, the want of the formality of an express notice, which had been thus waived, would be sanctioning injustice and fraud. As where, for instance, the delivery was upon a private wharf or dock, used exclusively by the carrier, and upon which it had been its custom and constant usage to receive goods left there for transportation by it, such a deposit, in the usual and accustomed manner, would be constructive notice, and would be regarded as sufficient delivery, though the goods were not left in charge of any of its servants.[33]

33. Merriam *v.* The Railroad, 180 Mass. 252, 62 N. E. Rep. 590; 20 Conn. 354; Converse *v.* Trans. Co., 33 Conn. 166. See also, Washburn-Crosby Co. *v.* Railroad Co., Truax *v.* Railroad Co., 3 Houst. 233, 251.

Where a railroad company erects

Sec. 116. (§ 91.) Same subject.—And so, where the plaintiff sent her trunk, properly labeled with her name and destination, to the depot of the company, during business hours in the evening, intending to take passage on its train the next morning, and the company's employees being at supper, the drayman put the trunk down in the waiting-room without notice to any of them, as he had often done before, which was proven to have been a custom with passengers intending to leave by the morning trains, it was held that when the trunk was thus deposited it was at the risk of the company, and, it having been burned during the night, the company was held liable. "That the delivery may be made at the proper place of receiving such baggage, under the express assent or authority of the carrier, without notice to its employees, will not, we presume, be disputed," said the court. "It is equally clear, upon principle, that this assent may be presumed from the course of business or the custom of the carrier. Upon evidence of this character, contracts based upon business transactions

a platform for the purpose of shipping cotton, and its course of business is such as to induce parties to store cotton on it for shipment by next freight train, and a party does so store it there for shipment, but the train passes and neglects to take it on, and it is destroyed during the delay by fire caught from sparks from the company's engines, the company is liable for the loss. Meyer *v.* Vicksburg R. R. Co., 41 La. Ann. 639.

A deposit of cotton in the street along side of the railroad platform or in the railroad cotton-yard, in pursuance of a custom to deposit it there for shipment, is sufficient. Montgomery, etc., Ry. Co. *v.* Kolb, 72 Ala. 396, approving text.

A shipper having freight to be transported by railroad cannot make a good delivery to the railroad company by simply depositing the goods anywhere along the line. But where, by agreement, freight is deposited at a given point on the line of railroad for the purpose of immediate transportation, such deposit will constitute a delivery to the company, and its liability as a common carrier will commence at the time the goods are so placed. Railway Co. *v.* Marchman, 121 Ga. 235, 48 S. E. Rep. 961.

A deposit of hay for immediate shipment at the usual place of loading hay at the carrier's depot, in pursuance of the usage of the parties, makes the carrier liable therefore as a common carrier. Railroad Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. Rep. 296.

are constantly established. . . . There was evidence tending to show a course of business on the part of the defendant, a custom to receive baggage left at the station-house, as in this case, without notice to defendants' servants. Upon evidence of this character, it was proper that the facts should have been left to the determination of the jury, whether there had been a delivery of the property within the rules above announced,—whether a course of business, a custom, had been established, to the effect that a delivery of baggage at the station-house, without notice, was regarded by defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom.''[34] And upon a second appeal to the same court, in the same case, from a verdict and judgment in the inferior court in favor of the plaintiff for the value of her trunk, after the case had been sent back for a retrial upon this view of the law, the court held that the jury was fully justified in finding that there was a delivery of the trunk to the company and an acceptance by it, and the judgment was affirmed.[35]

Sec. 117. (§ 92.) Same subject—Limitations on rule.—But where the proof was of delivery upon a boat of his trunk by one intending to become a passenger, and it was shown that this was the customary mode for the delivery of the baggage of passengers, but that this usage existed only as to baggage and not as to ordinary freight, it was held that the plaintiff could not recover for the loss of his trunk from the owners of the boat, inasmuch as he had not accompanied it upon the boat as a passenger and had not become under the circumstances the boat's passenger at all. And while it was admitted that a constructive delivery without notice might bind the carrier as to both baggage and freight when the usage was clearly proven, no such usage being shown in this case as to freight, which the trunk without its owner was to be considered, there had been no delivery and the owners of the boat were conse-

34. Green *v.* The Railroad, 38 Iowa, 100.

35. Green *v.* The Railroad, 41 Iowa, 410.

quently not responsible.[36] But it was decided in a leading case upon this branch of the law, that although, according to the usual custom and understanding of the parties, delivery on the dock by or near the boat might be sufficient, it must, in order to bind the carrier and make him responsible for them, be accompanied by express notice to him; and the defendant being informed that there were four boxes only, which he took on board, could not be held responsible for more, although five boxes had been really deposited on the dock for his boat, he having been informed that there were only four.[37]

Sec. 118. (§ 93.) Same subject—Rule to be applied with caution.—And it must be admitted that the doctrine of constructive delivery without notice to the carrier is one which should be applied with great caution. It is undoubtedly competent for him to bind himself by such a delivery either by his express agreement that a deposit of goods at a particular place shall be a valid delivery to him, or by so advertising it to the public, or by a well known and established custom to receive the goods in that way, which would perhaps be as binding upon him as to persons who have acted upon the notice or the usage as an express agreement; and cases may arise in which the usage and course of dealing between the parties should undoubtedly have that effect. But, certainly, to do so they should be shown to have existed and to have been uniformly acted upon by the parties, by the most satisfactory proof and for a sufficient length of time to have become an established usage, tantamount to an agreement to that effect, or to a declaration to the public that a delivery in accordance with the usage will be deemed an acceptance by him for the purpose of the transportation; and perhaps it should be shown that a reliance upon the previous course of dealing or the usage or the notice had controlled the action of the shipper in the particular instance. But few cases are to be found in which the rule has been ap-

36. Wright *v.* Caldwell, 3 Mich. 51.

37. Packard *v.* Getman, 6 Cowen, 757. And see also O'Bannon *v.* The Southern Express Company, 51 Ala. 481; Buckman *v.* Levi, 3 Camp. 414.

plied, and it is to be presumed that such instances will not be of frequent occurrence.

Sec. 119. (§ 94.) When the delivery becomes complete.—The entire responsibility for the safety of the goods being shifted from the owner to the common carrier as soon as the delivery is made, it frequently becomes a question of the greatest importance and of great nicety to determine at what instant of time such delivery becomes complete; for, as we have seen, until the entire exclusive custody of them has been given to the carrier, no responsibility rests upon him in that character. The most that can be said generally upon this subject is, that a tender of the goods being made to the carrier, his liability for their safety as carrier arises *eo instanti* with his acceptance of them.[1] The difficulty lies in applying the law in such cases and not in its statement; that is, in determining in the particular instance exactly at what time the circumstances show the acceptance to have taken place. To effect a delivery to the carrier there must be, either actually or in legal effect, a complete surrender to him of possession and custody, and, as a consequence, all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished; and until this has been done it cannot be said that the carrier has assumed any responsibility for them as carrier.

Sec. 120. (§ 95.) Same subject—Delivery to ships and vessels.—Delivery to a ship or vessel is complete as soon as the

1. The delivery is complete when the goods are accepted for carriage, and though the statute provides that transportation shall be deemed to have commenced when the bill of lading is signed, the carrier may become liable before if the goods have been actually delivered and accepted by him. East, etc., Ry. Co. *v.* Hall, 64 Tex. 615.

Where the shipper of goods has done all he intends to do to them before they are shipped, and has notified the carrier's agent that they are upon the platform and ready for shipment, and the agent agrees to forward them, there is a sufficient delivery to make the company liable as a common carrier. Stapleton *v.* Railway Co., 133 Mich. 739, 10 Det. L. N. 133, 94 N. W. Rep. 739, citing Hutchinson on Carr. See also, Railway Co. *v.* Murphy, 60 Ark. 333, 30 S. W. Rep. 419, 46 Am. St. Rep. 202.

master, mate or any other agent of the owner receives the goods; and they may be received upon the ship, on the wharf, on the beach or at a warehouse, or at any other place at which an agent duly authorized may agree to receive them; and in all such cases the liability of the master and owners as carriers commences at the moment of such acceptance.[2] It has been decided in a great number of cases that it is not necessary that the goods should be taken on board in order to fix the liability of common carriers upon the owners. Where a receipt had been given, and, before the goods had been put on board, a violent storm arose causing the tide to rise to an unusual height so as to flood the warehouse in which they had been placed, whereby they were damaged, and it was held that, "after the defendants had receipted for the merchandise, it was as much at their risk as if it had been on board the vessel."[3] And taking them upon a barge or lighter by direction of the ship's agent to be conveyed to the ship constitutes a good delivery to the ship. Where a vessel drawing so much water that it could not come to the wharf to take on cotton which it had contracted to carry was obliged to employ a lighterman to convey the cotton to her, who gave his own receipt for it, it was held that the liability of the ship and owners attached as soon as the cotton was loaded upon the lighter.[4] And where an ocean steamer could not reach the port to take passengers and freight on board, and her agent at the port employed a steamboat to take them down the river to the steamer, it was held that the freight was delivered to the steamer as soon as it was put on board the steamboat or delivered to its agents for the purpose of being conveyed to the steamer.[5] And the ship and owners become responsible for the freight from the

2. Story on Bail. § 534; Abbott on Shipping, ch. 3, § 3.

3. Greenwood *v.* Cooper, 10 La. Ann. 796.

4. Bulkley *v.* The Naunkeag, etc., Company, 24 How. 386; The Bark Edwin, 1 Sprague's Dec. 477; Insurance Co. of North America *v.* North German Lloyd Co., 106 Fed. 973; *affirmed in* Nord-Deutscher Lloyd *v.* President, etc., of Insurance Co., 110 Fed. 420, 49 C C. A. 1.

5. The Oregon, Deady R. 179.

time of its delivery, although no receipt or bill of lading be made out or signed for it until after the loss has occurred.[6]

But to constitute a delivery of goods which the owner places upon the carrier's wharf, it must appear, in the absence of any custom to the contrary, that a duly authorized agent received them for transportation; for if no acceptance be shown it cannot be said that the shipowner assumed the custody or control of them so as to impose upon him the responsibility of a common carrier. Thus, if the owner of baggage merely leaves it upon the carrier's pier with no directions as to its destination or the time of shipment, it is in no sense within the custody or control of the carrier so as to give the owner a maritime lien on the vessel for its loss; and the fact that he later purchases a ticket for passage on the vessel can make no difference.[7]

Sec. 121. (§ 96.) Same subject—Delivery to railroad and express companies.—Delivery of freight is usually made to railroads and express companies at offices, warehouses or stations which they have established for that purpose. And except in rare cases, resting upon peculiar and exceptional grounds as we have seen, notice must be given to the proper servant or agent of the company before the delivery will be complete. But if such agent become informed of the fact in any way, such knowledge will be as effectual to bind the company as express notice to him. Nor is it always essential, as has been shown, that the notice should be given to one who is an actual agent for the purpose of accepting the goods. For if the notice is given to one who is placed by the carrier in such a situation that those who come to deliver their goods for carriage have a right to presume that he is such an agent or has authority to accept them on behalf of the carrier, it is sufficient. Nor,

6. Snow *v.* Caruth, 1 Sprague's Dec. 324.

7. The Pricilla, 114 Fed. 836, 52 C. C. A. 470, *reversing* 106 Fed. 739.

The burden of proof is on a passenger to show a delivery, and until he does so the carrier cannot be made responsible for his baggage.

Lustig *v.* Navigation Co., 78 N. Y. Supp. 885, 38 Misc. 802.

as we have also seen,[8] is it always necessary that the delivery should be made at the office, warehouse, station or other place appointed or designed for the delivery of goods and generally used for that purpose; but it may be made wherever the proper agent may agree to accept it. The agent may, however, refuse to accept the goods at unusual places or away from the office or station appointed for the purpose; but if he do accept, no matter where, his company will become liable unless it be done under such circumstances as would implicate the shipper in an attempt to defraud it.[9] And such acceptance away from the usual place for receiving goods for carriage, or at any unusual place, must be by some agent whose business it is to receive the goods for that purpose, and not by one who is employed for an entirely different object;[10] and must be consistent with the general objects and business of the company.[11]

Sec. 122. (§ 97.) Carriers not required to stop for goods except at regular stations.—Nor can the owner of the goods require such carriers to stop anywhere except at their regular offices or stations[12] or other usual or designated place[13] to

8. See *ante*, § 115 and note.

9. Cronkite *v.* Wells, 32 N. Y. 247.

10. Blanchard *v.* Isaacs, 3 Barb. 388; Fisher *v.* Geddes, 15 La. Ann. 14; Dwight *v.* Brewster, 1 Pick. 50.

11. Missouri, etc., Co. *v.* The Railroad, 35 Mo. 84.

12. A carrier is not liable for not accepting goods unless they are offered at a regular depot or other usual or designated place for receiving freight; but when the goods are placed at a station upon the line of the road to be transported, the refusal of the carrier upon demand to furnish cars for the transportation of the property relieves the owner from making any further delivery or offer to deliver. Louisville, etc., Ry. Co. *v.* Flanagan, 113 Ind. 488.

A house and platform on the side of a track at which freight is occasionally received and discharged, but at which no agent's office or books are kept or bills of lading or receipts given, is not a "regular depot or station" within the meaning of a statute imposing a penalty for refusing to receive freight at such depots or stations. Kellogg *v.* Railroad Co., 100 N. C. 158. See, also, Land *v.* Railroad Co., 104 N. C. 48.

A mere switch at which there is neither agent, station nor platform is not a depot at which delivery may be made to the carrier. Kansas City, etc., R. Co. *v.* Lilly (Miss.), 8 S. Rep. 644.

13. As to what will constitute a stopping place by usage, see *ante*, § 115.

take on his goods. Nor can they be required to receive goods on or along a private switch. Their duties in this regard are confined and limited to their depots, or regular shipping or receiving points.[14] Where the conductor of a freight train had promised to stop his train and take on the plaintiff's goods, relying on which promise he had deposited them upon the roadside and they were lost in consequence of the failure to stop the train as had been promised, it was held that the company was not liable;[15] and it was said that if goods be put upon the platform at a regular station or depot, with the knowledge of the agent, it would be a good delivery and acceptance, and it would not be necessary that they should be entered on a way-bill or that any written memorandum should be made;[16] for the liability commences whenever the owner relinquishes his control over the goods and they are received for the purpose of being carried, and exists to the same extent as when they are put upon the train; but that all "way-side deposits" made for the purpose of saving the trouble of hauling to the regular depot are at the risk of the owner until the goods are put upon the cars.[17] So where the goods were stored in the warehouse or upon the platform of a railroad company with the permission of its agent, with the understanding that they should be shipped as soon as cars could be had to transport them and the permission of the military authorities which then had control of the road could be obtained, it was held that this did not constitute such a delivery to the road as a carrier as to make the company responsible in that character for the loss of the goods, but that they had incurred liability only as warehousemen. It would have been different, how-

14. Bedford-Bowling Green Stone Co. *v.* Oman, 134 Fed. 441; *s. c.*, 115 Ky. 369, 73 S. W. Rep. 1038.

15. Wells *v.* Railroad Co., 6 Jones' L. 47. See Meyer *v.* Vicksburg R. R. Co., 41 La. Ann. 639, cited in note to § 115.

16. The delivery is complete when the goods are actually accepted for carriage, and the carrier may become liable then without giving a bill of lading, even though a statute provides that transportation shall be deemed to have commenced when the bill of lading is signed. East Line, etc., Ry. Co. *v.* Hall, 64 Tex. 615.

17. See *ante*, § 115 and note.

ever, it was said, had the agent given a shipping receipt or entered into an express contract to transport the goods unconditionally.[18]

Sec. 123. Same subject—Express companies.—In the absence of a custom of receiving goods at other places, express companies cannot be required to accept goods for carriage at other than their regular places of business or lines of travel. And where an express company, in the collection of express matter establishes limits in a city beyond which it will not go for the collection of such matter, it is not obliged to go beyond the limits so established, although they include points in one part of the city which are a greater distance from its place of business than points in another part not within such limits.[19]

Sec. 124. (§ 98.) When carrier deemed to have accepted goods.—The long-established and familiar rule[20] as to the warehouseman, that his liability commences as soon as the goods arrive at his warehouse and the crane of the warehouse has been applied to them to raise them into the warehouse, has been applied to the common carrier under similar circumstances, and the delivery to him and his acceptance of the goods held to commence from the moment he or his servants undertake to load them from the conveyance of another carrier upon his own and for that purpose have attached his tackle to them. And where an engine was sent by a truckman to the depot of a railroad company for shipment, the delivery to the road was held to be complete and its liability to have commenced as soon as the work of transferring the engine from the truck to the company's car had been commenced by means of a derrick, the agent of the company being present, superintending and directing the work, and the case was said to be the same in principle as that of the warehouseman. As soon, therefore, as the work of transferring the engine was commenced

18. Ill. Cen. R. R. *v.* Ashmead, 58 Ill. 487; Same *v.* McClellan, 54 *id.* 58; Same *v.* Hornberger, 77 *id.* 457.

19. Bullard *v.* Express Co., 107 Mich. 695, 65 N. W. Rep. 551, citing Hutchinson on Carr.

20. Thomas *v.* Day, 4 Esp. 262.

under the superintendence of the road, the liability of the truckman as carrier ceased and that of the company commenced.[21]

Sec. 125. (§ 99.) Same subject—How when goods are loaded by owner.—When the owner of the goods has done all in his power and all that he is required to do by his understanding with the carrier or the usage of the business to further the shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them *in transitu,* the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him. The mere fact, therefore, that the owner of the goods has loaded them on a car, even though the carrier by the owner's directions has placed the car in a position convenient for such purpose, will not of itself be sufficient to constitute a delivery. Before the delivery will be deemed complete the owner must not only have relinquished his control over the car, but notice that it was ready for shipment must have been given the carrier. Thus where it was the course of business for a railroad company, when required to do so, to send its cars upon a side track at the place of shipment to receive cotton for transportation, and for the shipper there to load upon them the freight, make out a manifest and leave it with the agent of the company, who then had the bales counted, signed bills of lading, and sent locomotives to remove the cars thus loaded and place them in the train destined to the point to which the shipments were to be made, it was held that the delivery was complete as soon as the cotton was put upon the company's cars in this manner by the shipper and the company's agent informed of the fact.[22] And where the owner of lumber ordered a car in which to load lumber for the purpose of shipment, and the carrier, in pursuance of such order, placed a car on one of its side tracks for such purpose, and after the car was loaded, but before the carrier had been notified that it was ready for ship-

21. Merritt *v.* The Railroad, 11 Allen, 80.

22. Ill. Cent. R. R. *v.* Smyser, 38 Ill. 354.

ment, or had been apprised of the name of the consignee, it caught fire and the lumber was destroyed, it was held that as the carrier had not been notified that the car was ready for shipment, nor the name of the consignee given him, there was not such a delivery of the goods as to render him liable as a common carrier.[23] And in another case, it appeared that on account of there being no station agent located at the place of shipment, it was the custom between the plaintiff, a shipper of cotton, and the defendant carrier, for the plaintiff when he wished to make a shipment to notify the conductor of a local freight train to leave a car on a track adjoining the main track. The plaintiff, when the car was thus placed, would load it, and when the same was ready for shipment, he would flag the train to which he desired the car to be attached and the conductor of the flagged train would give him a bill of lading. In accordance with this custom, a car was placed upon the adjoining track which the plaintiff loaded with cotton. Shortly after the car was loaded, but before the passing of the next train, the car and its contents were destroyed by fire. It was held that while the car and the track upon which it was standing belonged to the defendant, yet not having been notified that the car was loaded and ready for shipment, there was no delivery and acceptance shown such as to render him responsible as a common carrier for the loss.[24] But where the owner of the goods has placed them in the car, and has given notice to the carrier that they are ready for shipment, or where, according to the course of dealing between himself and the carrier, he has done all that is required of him, of which fact the carrier has notice, so that whatever remains to be done is exclusively the work of the carrier, the delivery will be deemed

23. Basnight *v.* Railroad Co., 111 N. Car. 592, 16 S. E. Rep. 323. The mere loading of goods into a car standing on a side track does not constitute a delivery to the carrier, where the station agent, on being notified of the fact, declines to ship the goods. Yoakum *v.* Dryden (Tex. Civ. App.), 26 S. W. Rep. 312.

24. Tate *v.* Railroad Co., 78 Miss. 842, 29 So. Rep. 392, 84 Am. St. Rep. 649, citing Hutchinson on Carr.

complete, and the liability of the common carrier as such will at once commence.[25]

Sec. 126. (§ 99a.) Same subject—Implied acceptance.—So where the carrier has actually accepted the goods and undertaken their carriage, evidence of a formal or express acceptance is unnecessary. Thus where property was placed by the owner in a car for transportation without express authority from any authorized agent, but an agent having authority to receive the property for transportation knew that it was so placed there, and for what purpose, and did not object but permitted it to go forward, it was held that there was an implied undertaking on the part of the company to carry, and on the part of the owner to pay a reasonable compensation therefor.[26]

Sec. 127. (§ 100.) Checking, memorandum or entry on way-bill not necessary to complete delivery.—It has been often determined that no checking, written memorandum or entry upon a way-bill is necessary to complete the delivery. All that is necessary is a deposit of the goods with the carrier for the purpose of transportation; and if they be accepted by him to be sent forward in the ordinary course of his business, whether they are to be accompanied by their owner or not, the full responsibility of the carrier at once begins. Thus where the plaintiff, who intended to leave upon an afternoon train, carried his trunk to the depot in the forenoon, but was told by the agent of the road that it did not check baggage until within a few minutes before the train was to start, whereupon the plaintiff left his trunk in the care of the agent, and during the day, and after its delivery to the agent, it was broken open and rifled, it was held that the custom of checking could have no effect upon the character of the delivery, and that the company held the trunk from the first as a common carrier.[27]

25. Railway Co. *v.* Murphy, 60 Ark. 333, 30 S. W. Rep. 419, 46 Am. St. Rep. 202, citing Hutchinson on Carr. See *ante*, § 115 and cases cited.

26. Aiken *v.* Railway Co., 68 Iowa, 363.

27. Hickox *v.* The R. R., 31 Conn. 281.

And it may be stated generally that the baggage of a passenger deposited with the carrier or left with his agent at the usual place for delivering baggage, the passenger intending to proceed with it in the next train, boat or other conveyance, is in the custody of the carrier as carrier and not as warehouseman or ordinary bailee.[28] And where the owner of a carpet-bag, who had engaged but had not paid for his passage upon a boat, left it on the boat and temporarily absented himself, during which time it was stolen, in consequence of which he did not proceed upon his intended trip, it was held that he was entitled to recover for his loss.[29] But where the owner of a trunk deposited it on the boat in the usual place for baggage and then left the boat without giving any notice of his intention to become a passenger, it was held that he could not recover for its loss during his absence, upon the ground that not having engaged his passage or given any notice of his intention to do so, the boat was not bound to treat his trunk as the baggage of a passenger but merely as ordinary freight; and that as he had given no notice to any of the officers of the boat, there had been no valid delivery, though it had been deposited in the usual place for baggage.[30] As has been seen, the carrier is not liable until there has been a complete delivery.[31]

Sec. 128. (§ 101.) Delivery to ferry-men, when complete.— Ferry-men, it has been held, become responsible for the property which they transport as common carriers as soon as it has been brought upon the drop or slip of the boat,[32] and even before it has been completely put upon the ferry-boat and before it is put actually into the charge of the ferry-man.[33] But the better opinion would seem to be that the property should have been put into the custody of the ferry-man before

28. Camden T. Co. *v.* Belknap, 21 Wend. 354.

29. Woods *v.* Devin, 13 Ill. 746.

30. Wright *v.* Caldwell, 3 Mich. 51.

31. See *ante*, § 105.

32. Cohen *v.* Hume, 1 McCord, 439; Miles *v.* James, *id.* 157; Cook *v.* Gourdin, 2 Nott & McCord, 19.

33. Blakely *v.* Le Duc, 19 Minn. 187.

the absolute liability of the common carrier of goods should be imposed upon him. When the owner of the property retains its custody and keeps it under his own control, there has not been, it is said, such a delivery as is necessary to subject the ferry-man to the rigorous liability of an insurer, and he should be considered in such cases as undertaking for its safety only against defects in his boat and other appliances for the performance of the service, and for the neglect or want of skill of himself or his servants.[34]

34. Wyckoff *v.* The Ferry Co., 52 N. Y. 32; White *v.* The Winnissimmett Co., 7 Cush. 155.

The opinion of the court in this case, not only as it respects the liability of ferry-men, but of carriers generally, is so appropriate and instructive that we append so much of it as relates to this subject.

Dewey, J.: "To a certain extent, persons keeping and maintaining a ferry are common carriers. It would be so if a bale of goods or an article of merchandise was delivered by the owner to the agent of a ferry company to be carried from one place to another for hire. Upon receiving such goods for transportation the ferry company stipulate to carry them safely, and subject themselves to a strict liability for the safe carriage and delivery of such goods, being only exempted for losses occasioned by those acts which are denominated 'acts of God or of a public enemy.' The principle above stated would embrace the case of a horse and wagon received by a ferry-man to be transported by him on a ferry-boat, the ferry-man accepting the exclusive custody of the same for such purpose, and the owner having, for the time being, surrendered the possession to the ferry-man.

"But if the traveler uses the ferry-boat as he would a toll-bridge, personally driving his horse upon the boat, selecting his position on the same, and himself remaining on the boat, neither putting his horse into the care and custody of the ferry-man, nor signifying to him or his servants any wish or purpose to do so; and the only possession and custody by the ferry-man of the horse and vehicle to which he is attached, is that which necessarily results from the traveler's driving his horse and wagon or other vehicle on board the boat and paying the ordinary toll for a passage; in such case the ferry company would not be chargeable with the full liabilities of common carriers of merchandise. The liability in this case would be one of a different character; and if the proprietors of the ferry were chargeable for loss or damage to the property, it would be upon different principles. In reference to persons thus using the ferry, the company have responsible duties to perform, the neglect of which may charge them for the loss of goods and property placed on board their boat, when the

Sec. 129. (§ 102.) Delivery to connecting carriers to complete the transportation.—The question as to whether, under the circumstances, a delivery has been made by one of several connecting lines of carriers to another to which a delivery was

loss has been occasioned by their default. It is the duty of a ferry company to provide a good and safe boat, suitable for the business in which they are engaged, and they are required to have all suitable and requisite accommodations for the entry upon, the safe transportation while on board, and the departure from, the boat, of all horses and vehicles passing over such ferry. They are required to be provided with all proper and necessary servants and agents requisite for the safe and proper conducting of the business of the ferry, and with all proper and suitable guards and barriers on the boat, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveler. For neglect of duty in these respects they may be charged, but the liability is different from that of common carriers. The case of such a traveler, though not entirely similar, much more resembles that of a traveler upon a toll-bridge or turnpike road, who, while he uses the easement of another, yet retains the possession and custody of his horse and wagon. The party thus driving his own horse upon the boat, and retaining the custody of him, is bound, like the traveler on the toll-bridge or turnpike road, to use ordinary care and oversight in respect to his horse while on the boat, and if he does not use such ordinary care and oversight in respect to him, and for the want thereof the horse leaps overboard, or receives on the boat some injury, all of which might and would have been avoided if the party had used proper care and diligence, such party would himself bear the loss which has thus been occasioned by his own neglect.

"In deciding upon the nature and extent of the liability of ferry-men, and how far they are to be charged as common carriers, regard is to be had to the nature of the employment, and especially to the thing to be transported. This principle is practically applied in the well-known distinction relating to the liability of the proprietors of stage-coaches and other vehicles, as to the carriage of persons. No person thus carried in a public vehicle can recover damages for an injury to his person if his want of ordinary care contributed to the injury. Such carriers are not common carriers, with all the liabilities as such. One reason for the distinction is, that the persons thus carried are not, and cannot be placed, under the same custody and control as bales of goods. Being intelligent beings, and having the power of locomotion, and having the opportunity on the one hand, by their own voluntary acts, of exposing themselves to greater hazard, and on the other of guarding, to some extent, against perils, the law properly requires a person

necessary in order to complete the transportation of the goods, becomes frequently one of very great importance not only to the owner of the goods but to the connecting carriers themselves; for in many such cases the liability of the one or the

thus carried to exercise the ordinary care and vigilance to avoid exposure to danger, and if this is not exercised, and an injury is sustained, the carrier is not liable therefor.

"The same principle is further illustrated in the various decisions of the courts in cases of actions instituted for the purpose of charging the carriers of slaves as common carriers of merchandise. It was successfully and certainly most properly contended as to the carriage of slaves, that in those states where slavery is allowed by law, and where slaves are to some purposes treated as chattels, yet as they are human beings and cannot and ought not to be stowed away and confined like bales of goods, and placed under the absolute control of the carrier, the principle of the common law applicable to common carriers of merchandise could not be applied to the carriers of slaves. This was so held in Boyce *v.* Anderson, 2 Pet. 150; Clark *v.* McDonald, 4 McCord, 223.

"As having some bearing also on this question, we may allude to the modification of the principle of general liability as common carriers, in those cases where the owner of the goods accompanies them in their transit, retaining a certain control over them, as in Brind *v.* Dale, 8 Car. & P. 207, where it was held that if the owner of the goods accompanies them, to take care of them, and is himself guilty of negligence, he is not entitled to recover. This case also affirms as a rule of law a principle often found elsewhere, and which bears directly, as we think, upon the case before us, 'that a party cannot recover if his own negligence was as much the cause of the loss as that of the defendant.'

"Thus we perceive that a modification of the liability attached to common carriers occurs, as the nature of the thing to be carried, and the extent of the custody and control over it by the carrier, varies. We think that the propriety of such modification of what is certainly a very stringent rule of liability, in reference to cases where the entire custody and control of the property is not with the carrier, is quite obvious.

"The case of a traveler conveyed by means of a ferry-boat, where the traveler enters upon the boat driving his horse, attached to a wagon or other vehicle, selecting his own place upon the boat, and continuing to retain under his own custody his horse and wagon, neither committing it to the care of the ferryman or his servants, nor signifying any wish or purpose so to do, presents another instance where the liability of the carrier must be considered as of a restricted character; and as in the case of the carrier of persons, duties devolve upon the traveler, and he is bound to use ordinary care and

other will depend entirely upon the question of delivery; and without determining this question the owner cannot know against which of them to seek his remedy in case of loss when there is no partnership or joint liability, the rule being well settled that the obligation of the first or any preceding carrier is discharged when he has safely delivered the goods to the next succeeding carrier to whom such delivery is required in order to complete the transportation, whenever he has not bound himself to carry to destination, or has not assumed responsibility for those who connect with him.[1]

Sec. 130. (§ 102a.) Duty of first carrier to effect delivery to succeeding carrier—Perishable goods.—It is the duty of the first of two connecting carriers, upon the arrival of the goods at the point of connection with the succeeding carrier, if he knows where and to whom they are to be delivered, to use reasonable diligence to deliver the goods to the succeeding carrier, and, at all events, to make a tender of delivery, and to stand ready to deliver them in accordance with the tender.[2] And although the first carrier consults with the suc-

diligence in respect to his horse and vehicle, in order to prevent, as far as he can by such care, any injury occurring from fright or from other cause, immediately resulting from the movements of the horse. When such horse or other animal is surrendered into the custody of the ferry-man, the driver is bound to do all that can be effected by reasonable diligence and supervision to prevent a loss of his property occasioned by his horse becoming restless or affrighted. If the traveler wholly neglects his duty in this respect, leaving his horse without any oversight, and the horse, without fault of the ferry-man, becomes affrighted and throws himself and the vehicle to which he is attached overboard, when by proper care and attention of the driver this casualty would in all reasonable probability have been avoided, the loss must fall upon the traveler."

A different conclusion has, however, as we have seen, been reached in other cases, and some of them have even gone so far as to hold that the custody of the owner is the custody of the ferry-man, the former becoming the agent of the latter for taking care of the property. *Ante*, §§ 65 & 66 notes.

1. This subject is fully discussed in the following chapter, where a full citation of authorities will be found.

2. Regan *v.* Railway Co., 61 N H. 579; McKay *v.* Railroad Co., 50 Hun, 563; Insurance Co. *v.* Rail-

ceeding carrier about receiving the goods, and thereupon is informed that a delivery will be refused, if no actual tender is in fact made, the liability of the first carrier, as such, will still remain.[3] The question whether or not the first of such carriers has used reasonable diligence to effect a delivery must, of course, be determined in view of all the circumstances of the case, for conduct which might show that the carrier had used reasonable diligence in making a delivery to the succeeding carrier of goods of one description might, as to goods of another description, constitute the grossest negligence.[4] And if any particular carrier has been designated as the succeeding carrier, the goods must be delivered to him if he will accept them,[5] and for a failure so to deliver them the first carrier will be liable as for a conversion.[6] So if the first carrier, by mistake or otherwise, deliver the goods to another than the carrier so named, such wrongful act will render him an insurer of their safe delivery at destination.[7] If there is but one connecting carrier, it will be presumed that he was intended; if there be more than one but none designated, then the first carrier will perform his duty if he delivers them to be forwarded in the usual and customary way.[8] Where the succeeding carrier has been designated, but, for any reason,

road Co., 8 Baxt. 268; Whitworth *v.* Railroad, 87 N. Y. 413; Rawson *v.* Holland, 59 N. Y. 611; Burroughs *v.* Railroad Co., 100 Mass. 26; Dunham *v.* Railroad Co., 70 Me. 164; Railroad Co. *v.* Diether, 10 Ind. App. 206, 37 N. E. Rep. 1069, 53 Am. St. Rep. 385, citing Hutchinson on Carr; Palmer *v.* Railroad Co., 101 Cal. 187, 35 Pac. Rep. 630, citing Hutchinson on Carr; Felton *v.* Live Stock Co., 22 Ky. Law Rep. 1058, 59 S. W. Rep. 744.

Where there was an express provision in a contract of shipment that the carrier was not bound to transport the goods in time for any particular market, *held*, that he was not liable for a failure to tranship the goods on the night of their arrival in port. The Nutmeg State, 103 Fed. 797.

3. Railroad Co. *v.* Diether, *supra.*

4. Railroad Co. *v.* Potter, 36 Ill. App. 590.

5. Rawson *v.* Holland, 59 N. Y. 611.

6. Georgia R. Co. *v.* Cole, 68 Ga. 623.

7. Brown & Haywood Co. *v.* Railroad Co., 63 Minn. 546, 65 N. W. Rep. 961.

8. Rawson *v.* Holland, 59 N. Y. 611; Lamb *v.* Railroad, 46 N. Y.

as the sudden cessation of his operations, he cannot take the goods, the first carrier will perform his duty, where the goods are perishable, if he forward them by the best means reasonably to be had,[9] and he is not liable if they perish without his

271; Van Santvoord *v.* St. John, 6 Hill, 160; Railway *v.* Woodward, 164 Ind. 360, 72 N. E. Rep. 558; *s. c.* 73 N. E. Rep. 810. See also, Railway Co. *v.* Callender, 183 U. S. 632; Railway Co. *v.* Clayton, 173 U. S. 348, 19 Sup. Ct. R. 421, 43 L. Ed. 725; Southern Ry. Co. *v.* Goldstein Bros., — Ala. —, 41 So. Rep. 173.

"A shipper, who receives a bill of lading for goods consigned to a point beyond the terminus of the initial carrier's line, authorizes the initial carriers to select any usual or reasonably direct and safe route by which to forward after the goods reach the end of his line, unless the particular line by which the goods consigned are to be forwarded is designated in the bill of lading. In such a case, the bill of lading being silent in respect to the line by which the goods are to be forwarded, its effect is the same as if a provision were therein inserted that the carrier should have the right to select at his discretion any customary or usual route which was regarded as safe and reasonable." Snow *v.* Railway Co., 109 Ind. 422.

9. In Regan *v.* Railway Co., 61 N. H. 579, perishable goods had been shipped by defendants' railway to its terminus at Portland, whence they were to be shipped by boat to Boston. The goods reached Portland, in due course on Saturday after the boat had gone. Sunday no boat ran, and on Monday the boat agent notified defendants' agent that on account of a severe storm raging no boat would run that day, and that he did not know when it would run again as it looked like a long storm. Defendants' agent therefore sent the goods on that day to Boston by railroad, but did not notify consignee of the change. The train got off the track owing to the storm and was delayed, so that when the goods reached Boston they were damaged. Said the court: "The defendants' undertaking was to carry the plaintiff's goods from Groveton to Portland, and deliver them to the boat for transportation to the consignee at Boston. When they had carried the goods to the terminus of their line in Portland, and had notified the agent of the boat line that they were ready to deliver the goods for further conveyance, they had done all that was required by the terms of their contract; and if the ordinary running of the boat had not been interrupted, they would have been relieved from further liability. Gray *v.* Jackson, 51 N. H. 9; Insurance Co. *v.* Railroad, 104 U. S. 146. By an unforeseen event, for which the defendants were not responsible, it was impossible to forward the goods by the conveyance specified. The failure of the boat to run as usual did not impose upon them the duty of transporting the goods from Portland to Boston. That duty they had never assumed, and no change of circum-

fault before he can forward them.[10] But if the connecting carrier designated cannot receive the goods and the goods, although perishable, are such as can properly be cared for until the shipper can be communicated with and orders for disposition secured, the carrier will not be justified in selecting another route without instructions to do so from the shipper, and the fact that the bill of lading contains a clause that

stances could subject them to the extraordinary responsibilities of carriers beyond the termination of their route. But, although they owed no duty of further transportation, the defendants were bound to the exercise of reasonable care, and to so conduct in relation to the plaintiff's goods that he should suffer no unnecessary loss or damage. Though no longer liable as common carriers, they were liable as depositaries, and required to exercise ordinary care in the custody of the goods. In cases of accident or emergency, it sometimes happens, although the transit is at an end, that the duty is cast on the carrier of taking such reasonable care of the property as a reasonable owner would take of his own goods. Railway Co. *v.* Swaffield, L. R. 9 Ex. 132. And a carrier is bound to use all reasonable means, such as a prudent owner being present would take, to save the property from loss by natural causes. Edward's Bail., sec. 598; Peck *v.* Weeks, 34 Conn. 145; American Express Co. *v.* Smith, 33 Ohio St. 511; S. C., 31 Am. Rep. 561, and notes, 567; Empire Transportation Co. *v.* Wallace, 68 Pa. St. 302; N. & C. R. R. Co. *v.* David, 6 Heisk. 261. What constitutes such reasonable care and diligence is a question of fact to be determined with reference to all circumstances of the case. Cass *v.* B. & L. R. R., 14 Allen, 448, 450. The defendants' agent learning that the boat would be prevented from running on account of the storm, and knowing the perishable character of the goods, forwarded them the same afternoon by the Eastern Railroad; and the referee finds that in so doing he exercised due care and prudence, but that he was negligent in not notifying the consignee of the change of route. He also finds that such notice would not have avoided the loss, and that the plaintiff suffered no injury by reason of the negligence of the defendants' agent. Upon these facts the plaintiff's action cannot be maintained. After the termination of the defendants' liability as common carrier, they were answerable only for injuries happening in consequence of their own negligence. They were not responsible for losses which they could not have prevented by the exercise of due care. Sh. & Red. Neg., sec. 8."

10. As where goods are to be forwarded by steamboat but boats cannot run because of low water, and before goods can be forwarded they are burned in the warehouse by accidental fire. Hornthal *v.* Steamboat Co., 107 N. C. 76.

any carrier shall have the right in case of necessity to forward property by any route can make no difference.[11] If the goods have come into the hands of the first carrier with instructions or conditions as to their ultimate delivery or disposition, it is the duty of the first carrier to see that the same instructions and conditions are transmitted to the succeeding carrier, and if he fails to do so and the goods are thereby lost he will be liable.[12]

Sec. 131. (§ 103.) When liability of first carrier terminates.—But the responsibility for the safety of the goods can only be shifted when there has been such a change in the possession of them from the one to the other as will be tantamount to a delivery to the latter or succeeding carrier;[13] or, in case the succeeding carrier neglects or refuses, after notice of their arrival and a tender of delivery, to receive the goods, then, when the first carrier, after notice of all these facts to the consignor or consignee, has used reasonable diligence to store and care

11. Fisher *v.* Railroad Co., 99 Me. 338, 59 Atl. Rep. 532, 105 Am. St. Rep. 283, 68 L. R. A. 390. If the shipment consists of perishable goods, and the succeeding carrier refuses to accept them, the first carrier must make a reasonable effort to secure instructions as to their care and disposition; and if he fails to do so and the goods are allowed to spoil, his omission will amount to such a breach of duty as will make him responsible for the injury. Shea *v.* The Railway, 66 Minn. 102, 68 N. W. Rep. 608.

12. North *v.* Transportation Co., 146 Mass. 315; Richer *v.* Fargo, 78 N. Y. Supp. 1007, 77 App. Div. 550. See *post*, § 139.

13. Reynolds *v.* Railroad Co., 121 Mass. 291; Insurance Co. *v.* Railroad Co., 8 Baxt. 268; Lesinsky *v.* Great Western Dispatch, 10 Mo. App. 134; Gray *v.* Jackson, 51 N H. 9; Insurance Company *v.* Railroad Co., 104 U. S. 146; Regan *v.* Railway, 61 N. H. 579; McKay *v.* Railroad Co., 50 Hun, 563; Davis *v.* Transportation Co., 106 Mo. App. 487, 81 S. W. Rep. 226; Hunting Elevator Co. *v.* Bosworth, 179 U. S. 415, 45 L. Ed. 256, 21 Sup. Co. R. 183, *reversing* Bosworth *v.* Railroad Co., 87 Fed. 72, 30 C. C. A. 541.

Where cotton shipped by one railroad arrived at the point of connection with the succeeding railroad in the evening, and next morning the car was placed on the switch or "Y" which connected the two tracks, but the car had not been hauled to the transfer platform of the second road, nor had the cotton been examined or checked off the bill of lading, and the cotton was burned after

for the goods, and has renounced his relation of carrier to them.[14] So long, therefore, as the first or any succeeding car-

standing for three hours on the switch, it was held that the delivery was not complete, and that the first company was still liable. Insurance Co. *v.* Railroad Co., 8 Baxt. 268. For a similar case, see, also, Alabama, etc., R. R. *v.* Mt. Vernon Co., 84 Ala. 173.

And to constitute a delivery, either actual or constructive, even as between the connecting carriers themselves, the goods must have been at least removed from the conveyance on which they have been transported to the point of connection for further shipment.

Where a steamboat and a railroad formed by agreement a continuous line, and the steamboat arrived at a wharf owned by the railroad company, upon which the goods had to be unloaded for the railroad, whereupon the employees of both the boat and the railroad commenced unloading the goods by hand and in trucks, and carrying them across the wharf to the cars, no account being kept of the goods taken from the boat or to the railroad or put upon the wharf, and while they were thus engaged, and before the goods had been removed from the boat, the wharf, boat and goods took fire and were burned, it was held that the railroad was not liable for the goods which had not been removed from the boat, having neither actual nor constructive possession of them, and that there had been no delivery even of the goods which had been taken in charge for the purpose of removal by its own servants or employees if not actually removed from the boat. Gass *v.* N. Y., etc., Railroad, 99 Mass. 220.

Delivery of baggage to a connecting carrier, sufficient to relieve the first carrier of liability, is not shown by the common agent of both carriers taking it in charge and placing it in a baggage room used by both carriers in common. Hyman *v.* Railroad Co., 66 Hun, 202, 21 N. Y. Supp. 119.

14. Lesinsky *v.* Great Western Dispatch, 10 Mo. App. 134; Regan *v.* Railway, 61 N. H. 579; McKay *v.* Railroad Co., 50 Hun, 563; Whitworth *v.* Railroad, 87 N. Y. 413; Condon *v.* Railroad Co., 55 Mich. 218.

In Whitworth *v.* Railroad, *supra*, plaintiff had shipped cotton from Memphis for Liverpool. It was contracted to be carried to New York by a dispatch company which conducted its operations over a number of successive railroads of which the defendant was the last, its terminus being in Jersey City. Defendant carried the cotton to Jersey City, where a portion of it, then in defendant's warehouse, was destroyed by fire, without any negligence on defendant's part. It appeared that the way-bills of the dispatch company consigned the property to its agents in New York. The uniform course of business between defendant and the dispatch company had been for defendant, on arrival of property, to give notice thereof to the agent named in the way-bill, whose duty it then was to obtain a permit from the steam-

rier permits the goods to remain upon his vehicle awaiting the convenience or necessities of a succeeding carrier who neglects or unreasonably delays to receive them, he will hold them subject to the liabilities of a common carrier until by warehousing them or otherwise, he does some unequivocal act indicative of a purpose to change his office from that of carrier for transportation to that of a mere custodian for safe keeping.[15] If the goods consist of live stock, and for any reason they are refused transportation by the succeeding carrier, the carrier in whose custody the stock is may place it in suitable pens and, after giving notice to the proper party, he will be bound to the exercise of reasonable care only.[16] But the first carrier cannot relieve himself from his liability as an insurer of the goods by simply unloading them at the end of his route and storing them without having made an attempt to deliver them to the connecting carrier in the route.[17] And a mere notice to the connecting carrier to remove the goods, unaccompanied by

ship company for delivery to the latter and to give the permit to defendant; and on receipt of it the defendant would deliver the goods on lighters to the proper vessel. On arrival of the cotton in question, prompt notice was given to the proper agent, but permits were not obtained, and defendant, although persistently urging said agent to obtain the permits, was unable to get rid of the cotton. *Held* that, assuming that there was unreasonable detention of the cotton, defendant was not responsible for the delay in delivery; that it had fully discharged its duty when it gave prompt notice of the arrival and held itself ready to deliver as soon as the permits were obtained.

15. Bennitt *v.* Railway, 46 Mo. App. 656.

16. Larimore *v.* Railroad, 65 Mo. App. 167.

17. Railroad Co. *v.* Manufacturing Co., 16 Wall. 318; Irish *v.* The Railway, 19 Minn. 376; Gass *v.* The Railroad, 99 Mass. 220; West. Trans. Co. *v.* Newhall, 24 Ill. 477; Mer. Des. Co. *v.* Kahn, 76 *id.* 520; L. & N. R. R. *v.* Campbell, 7 Heisk. 253; Brintnall *v.* The Railroad, 32 Vt. 665; Blossom *v.* Griffin, 3 Kern. 569; Mills *v.* The Railroad, 45 N. Y. 622; Root *v.* The Railroad, *id.* 524; Michaels *v.* The Railroad, 30 *id.* 564; Condict *v.* Railway Co., 54 *id.* 500; McDonald *v.* Railroad, 34 *id.* 497; Ayres *v.* Railroad, 14 Blatchf. 9; Railway Co. *v.* Reiss, 183 U. S. 621, 22 Sup. Ct. R. 253, *affirming*, *s. c.* 99 Fed. 1006, 39 C. C. A. 679, *and* 98 Fed. 533, 39 C. C. A. 149.

a tender of delivery, will be ineffectual in divesting the first carrier of his liability as an insurer.[18]

Sec. 132. (§ 103a.) Same subject—Duty when succeeding carrier neglects or refuses to receive the goods.—Where the succeeding carrier neglects or refuses for any reason or is unable to receive the goods, the first carrier must use reasonable diligence to notify the consignor or consignee, and to take reasonable care to preserve the goods from injury while awaiting instructions as to their disposition. If he fails to use reasonable diligence to notify the consignor or consignee,[19] or if he leaves the goods exposed to danger,[20] he will be liable for their loss or injury. In either case his liability as carrier is not terminated. And if the first carrier, when the goods are refused by the succeeding carrier, should undertake to send them forward over the route of some other carrier, it would be his duty, as the forwarding agent of the owner, to exercise the same care in selecting a carrier or succession of carriers for the purpose as the owner, being a man of ordinary prudence, would have exercised had he been present and as fully acquainted with all the lines and connections as the first carrier.[21] But where the succeeding carrier neglects or refuses to receive the goods after

18. Railway Co. *v.* Clayton, 173 U. S. 348.

19. Petersen *v.* Case, 21 Fed. 885; Lesinsky *v.* Great Western Dispatch, 10 Mo. App. 134; Railroad Co. *v.* Diether, 10 Ind. App. 206, 37 N. E. Rep. 1069, 53 Am. St. Rep. 385, citing Hutchinson on Carr; Railroad Co. *v.* Odill, 96 Tenn. 61, 33 S. W. Rep. 611, 54 Am. St. Rep. 820; Bird *v.* Railway Co., 99 Tenn. 719, 42 S. W. Rep. 451, 63 Am. St. Rep. 856.

The general rule of law is, that an intermediate carrier, who receives goods to be carried to a point short of their final destination, is bound only to use reasonable diligence to secure further transportation by tendering them to the connecting line, and, if acceptance be refused, to notify the consignor or consignee, without unreasonable delay, and store, or otherwise take care of them while awaiting instructions. Having done this, his liability as a carrier will cease and the liability of a warehouseman will be substituted. Buston *v.* The Railroad, 119 Fed. 808, 56 C. C. A. 320, *affirming*, 116 Fed. 235.

20. Goold *v.* Chapin, 20 N. Y. 259; Miller *v.* Navigation Co., 10 N. Y. 431.

21. Railroad Co. *v.* Duncan & Orr, 137 Ala. 446, 34 So. Rep. 988.

a proper tender of them has been made, a failure to give notice of such refusal to the consignor or consignee will not be ground for the recovery of damages when notice would not have averted the loss, and the parties have consequently suffered no injury by reason of the failure to give it;[22] nor should notice be required where because of the perishable nature of the goods, to give it would not be practicable on account of the fact that a delay might cause their injury or destruction.[23] Where a succeeding carrier refused to accept goods intended for him, and the first carrier stored them in his warehouse, but did not give either the consignor or the consignee notice of the second carrier's refusal of them until about three months after they were shipped and six weeks after their non-arrival had been reported to him, after which time the consignee refused to accept them as the season for their salability had passed, and they had greatly declined in value, it was held that the first carrier was liable for the injury so occasioned.[24] So where goods were delivered to a carrier by water to be forwarded over several connecting lines, and at the end of its own route it deposited them upon a float of its own, lying in a basin, which was prepared and kept by it for the purpose of delivering freight to the connecting carrier, and though it gave notice to such connecting carrier on three successive days that the goods were on the float for it, accompanied by a request to come and take them away, yet permitted the goods to remain for three days on the float, and on the afternoon of the third day the float and goods were destroyed by fire not attributable to the negligence of the carrier, it was held that his liability as common carrier still continued when the goods were burned.[25]

22. Regan *v.* The Railway, 61 N. H. 579.

23. Railroad Co. *v.* Duncan & Orr, *supra.*

24. Lesinsky *v.* Western Dispatch, 10 Mo. App. 134.

25. Goold *v.* Chapin, 20 N. Y. 259; Miller *v.* Navigation Co., 10 N. Y. 431.

In Lesinsky *v.* Western Dispatch, 10 Mo. App. 134, *supra*, Thompson, J., said: "By accepting the plaintiff's goods, directed to a point beyond the termination

Sec. 133. (§ 103b.) How duty to make delivery to a succeeding carrier affected by usage.—The general obligation created by law in respect to the mode of making delivery to a connecting carrier may be controlled by a generally estab-

of its own line, and consigned to the care of a carrier whose line connected with its line, the defendant assumed the duty of delivering them to such connecting carrier. Rawson *v.* Holland, 59 N. Y. 611. Delivery to the connecting carrier in this case being impossible by reason of the fact that such carrier refused to receive the goods, did the defendant incur liability to the plaintiff for failing to give notice of that fact?

"It is familiar law that the liability of a carrier does not cease till he has delivered the goods to the consignee, or made a reasonable attempt to deliver them.

"Where his own route extends to the place of ultimate destination of the goods, and the consignee refuses to receive the goods, he ordinarily discharges himself from liability by storing the goods safely without giving notice to the consignor, although there are some cases which hold that such notice must be given. The reason why such notice is not ordinarily required seems to be that the consignee is presumptively the owner of the goods, the consignor the agent of the owner for the purpose of shipment, and the carrier, in like manner, the agent of the owner. Hutch. on Car. § 108; Briggs *v.* Railroad Co., 6 Allen, 246. It is, therefore, a case where an agent tenders performance of his contract to his principal, and the latter refuses, in which case there seems to be no good reason why the agent should be held bound to notify a third person of that fact. But the reason of this rule does not apply to the case where the carrier undertakes to transport goods over his own line and deliver them to a connecting carrier to complete the transit. Here, the goods having passed wholly out of sight of both the consignor and consignee, if, from any circumstance, delivery to the succeeding carrier becomes impossible, the former carrier is under an obvious duty to notify either the consignor or the consignee, unless it is impracticable to do so. Where notice may be readily sent by letter or by telegram, he is, on principle, guilty of a clear breach of duty if he neglects to send it, and there are cases which so hold. Convoy's Wheat, 3 Wall. 225; Railroad Co. *v.* Campbell, 7 Heisk. 253, 261.

"In all of these cases the carrier is bound to do what, under the circumstances, is reasonable. Hudson v. Baxendale, 2 Hurl. & N. 575. Where, as in this case, the goods have passed out of the hands and out of the sight both of the consignor and the consignee, and are interrupted in their transit by a circumstance unknown to either, but known to the carrier, it cannot for a moment be argued that the carrier does what is reasonable by housing the goods, giving notice to no one, and losing all knowledge of them himself. No more

lished and uniform usage.[26] In Rawson *v.* Holland,[27] Andrews, J., said: "It is said in Van Santvoord *v.* St. John,[28] that a carrier who receives a box marked in a particular way, without any directions except such as may be inferred from the marks themselves, has a right to presume that the consignor intends that he shall transport and dispose of them in the usual and customary way. That was the case of a carrier by towboats on the Hudson river who received a package marked 'J. Petrie, Little Falls, Herkimer county,' and it was held that the first carrier was justified in delivering it at the end of his route to a succeeding carrier by canal, and was discharged thereby from further responsibility; it being shown that there was a general, established and uniform usage in the business that such delivery might be made; and it was also held that the consignor was bound by it whether he knew it or not." But if a usage or custom be relied on to affect or control the general obligation created by law, and it appears that such usage or custom lacks the essential elements of a valid usage, namely, that it was not so general, established and uniform that the parties could reasonably be presumed to have contracted with reference to it, the general obligation created by law and not the usage will control. Thus a custom of a particular road that goods destined to points on another which

convincing argument against such a conclusion could be suggested than the circumstances of this case. Here were goods of the value of several hundred dollars, interrupted in their transit at a point remote from consignor and consignee. A postal card costing a cent, and a few scratches of a pen by a clerk, would have notified either of this fact. For nearly three months a knowledge of their whereabouts was completely lost to the consignor, the consignee and the defendant. In the meantime the season during which they were salable had passed, and they were, for this reason, greatly depreciated in value. This seems to make out a clear case for the recovery of damages. But if, in addition to this, the circumstances which obstructed the goods in their transit existed for six days only after they arrived at the end of its line, and the defendant knew of the fact of the obstruction being removed, then the failure of duty on its part is still more clear."

26. Gibson *v.* Culver, 17 Wend. 305.

27. 59 N. Y. 618.

28. 6 Hill, 160.

connected with it should be detained until notice was given to the consignees and their direction taken as to sending them by that road will not relieve the first road from its obligation to deliver, and it will be liable if the goods are lost during the delay. "The proof," says Andrews, J.,[29] "falls far short of establishing a custom superseding the general obligation of the defendant to make delivery of the goods to the next carrier. At most it was a usage recently established and confined to the particular business of the defendant at a particular place, not known to the plaintiffs, and which they were not bound to ascertain. The usage relied upon in this case lacks the essential elements of a valid usage. It is neither general, established, uniform or continuous. It would be unreasonable to give it effect in this case to defeat a recovery by the plaintiffs. The parties did not make their contract in reference to it, and cannot be presumed to have done so. It is the general rule that a local usage must be shown to have been known to a party before he will be held to be bound by it."[30] And in The Railway Co. *v.* Hassell,[31] where a custom was observed between two carriers of holding goods in transit whenever a controversy arose between them over the proper amount of freight charges tendered by one to the other until the charges were adjusted or corrected, it was held that such a private understanding between the two companies, not amounting to a general, established and uniform custom in the business, could not operate to relieve the carrier whose neglect to promptly forward the goods had occasioned damage, from the obligation imposed by law to exercise reasonable diligence in sending the goods forward, and that he was liable for any damage arising from a delay thus caused.

Sec. 134. (§ 104.) Agreements between carriers not binding on owner.—As between the connecting carriers themselves it is undoubtedly true that by express agreement, by usage

29. Rawson *v.* Holland, 59 N. Y. 618

30 See also, Dunham *v.* Railroad 70 Me. 164.

31. 23 Tex. Civ. App. 681, 58 S. W. Rep. 54, citing Hutchinson on Carr.

and custom in a particular trade, or from the course of dealing between the particular carriers, the responsibility may be changed from one to another by what is known as constructive delivery, which implies no actual or manual transfer of the possession of the goods. But as to the owner of the goods the doctrine of constructive delivery can have no application, and he can be required to look for the reparation of his loss only to the carrier in the actual possession when it occurred; and the carrier whose duty it was to make the delivery to the succeeding one will be presumed to have still had the possession until it be shown that it had been actually transferred to another. In Conkey *v.* The Railway,[32] the defendant carried the goods to the end of its own route and deposited them in a part of its warehouse appropriated to freight going to the point to which the goods in question were consigned, and it was proven to have been the course of business between the defendant and the connecting line that when goods were so deposited they were taken by the latter without further notice, and that it had had in this instance ample time and opportunity to remove the goods after they had been so deposited. The contention, therefore, was that the plaintiff's recourse was upon the connecting carrier which was thus shown to have been in fault, and not upon the defendant. But the court, in an able opinion by Dixon, C. J., held that the rights of the owner of the goods could not be affected by a delivery by usage and notice, as was claimed, when it was to be made by one carrier to another for the purpose of continuing the transportation; and that in an action to recover for the loss in such cases, proof of the actual possession by the defendant is conclusive against him. But it was said that as between the carriers themselves the loss should be borne by the one in fault, and that there could be no doubt that if the one not in fault be compelled to account to the owner for the loss, he could compel an adjustment by the other by the proper legal remedy. The owner can never know where the fault lay; nor is it in

32. 31 Wis. 619.

his power in many cases to ascertain whether a delivery from one to the other has been made or not, if such delivery is made to depend upon circumstances other than an actual change of possession. As between the carriers themselves, however, it would of course be generally known who was in fault; and whether known or not, it would be more consistent with justice that they should settle between themselves upon whom the loss should fall, than that the owner who had sustained the loss should be put to the difficult task of finding out the truth, at the risk of being defeated in his suit. He is therefore required to look no further than the actual possession at the time of the loss; otherwise he might be the victim of a usage or a notice of which he had never heard.[33]

Sec. 135. (§ 105.) Same subject—Illustrations.—So in the case of McDonald *v.* The Railroad Corporation,[34] the carrier

33. This case overruled the previous case of Wood *v.* The Railway, in the same court, 27 Wis. 541, in which it had been held, under the same facts, that the carrier had exonerated himself from liability to the owner by the constructive delivery, by usage and notice, upon the ground that the shipper was bound to know the usages and general course of business between the carrier to whom he intrusted his goods and the succeeding carrier, as to the manner of delivery for further carriage from one to the other, and was, therefore, bound by them. That the owner of the goods is bound to take notice of such customary courses of dealing between connecting lines of carriers seems also to be the rule of the New York courts, and he is there considered, it seems, as contracting in reference to them, and will be held to have agreed with the carrier, where there is no express contract, for the transportation and disposal of his goods in the way usual and customary with him. Van Santvoord *v.* St. John 6 Hill, 157; Mills *v.* The Railroad, 45 N. Y. 622. Still, in that state, no case has been found, out of the many decided upon the subject, in which the carrier whose duty it was to deliver the goods to the connecting carrier has been exonerated from liability to the owner upon the ground of a delivery to such connecting carrier constructively, although it might have been the customary mode of delivery between the two carriers.

But see the case of Elliott *v.* Railway Co., 58 Mo. App. 80, where a delivery was made to a joint agent by the initial carrier and the question of liability was held to depend upon the usage and course of dealing between the initial and connecting carrier.

34. 34 N. Y. 497.

took the goods to the end of its own route and there deposited them in its own warehouse, from which it was proven the succeeding carrier was accustomed to take them without further notice, but that in this instance he neglected to do so for some two weeks, at the end of which time they were destroyed by an accidental fire while they still remained in the defendant's warehouse. In the meantime the defendant had made no request of the succeeding carrier to take the goods, nor had it in any way attempted to divest itself of the liability of a common carrier by renouncing that relation, as, it was said, it perhaps might have done. It was contended that under these circumstances the defendant had done all that it could be required to do as carrier, and that its liability at the time of the loss was, at most, only that of warehouseman; but it was held that it had done nothing which changed its responsibility as carrier to the owner of the goods, and that it was therefore liable to him for the loss. So in Condon *v.* Railroad Company,[35] the defendant had received from the preceding carrier goods which had come over a number of lines from New York. Defendant carried them to the end of its line and deposited them in its warehouse. From its terminus the goods were to be forwarded by an overland transportation company to their destination. It appeared that it was the customary mode of business for the receipts of goods to be entered at the warehouse upon books of the defendant which were open to inspection by the transportation company and which were regularly inspected by the agent of that company to ascertain what goods were to be taken by it. The transportation company was then accustomed to take all goods found consigned to places on its line, load them at the warehouse on its vehicles and receipt for them to the defendant. When the goods in question arrived no notice was given to the transportation company nor was the attention of the agent called to them, or any request made for their removal. They simply remained in the warehouse, where they were destroyed by accidental fire a

35. 55 Mich. 218.

week after their arrival. The action was brought to charge defendant as a common carrier, and it was resisted upon the ground that defendant's liability as a carrier had terminated. The court, however, held otherwise. "The connecting carriers in this case," said Cooley, C. J., "appear to have established a custom of their own, under which actual delivery of the goods or notice to take them was dispensed with, and the one was to ascertain from the books of the other what goods were ready for reception and further carriage. This, as between themselves, was well enough while it worked well; but it was an arrangement to which the plaintiff was not a party, and the defendant could not by means of it relieve itself of any liability which duty to the plaintiff imposed. And it was clearly its duty to the plaintiff, as we think, to relieve itself of the responsibility of the goods remaining for an unreasonable time in its warehouse; and to do this, it was necessary that the responsibility be transferred to the carrier next in line. But the mere permission to inspect its books and take whatever was ready for carriage would not do this; there should have been distinct notice which would apprise the other carrier that defendant expected the removal of the goods. In this case there were no facts indicating a renunciation, as to these goods, of the liability of common carrier by the defendant, or that it was supposed by the agents of the defendant that that character had been exchanged for any other. If it ever was, it must have been at the moment the goods were received; for nothing took place afterwards to change the relation of the defendant to the goods until the fire took place. But we are not ready to assent to the doctrine that a railroad company, as to goods transported by it, ceases to be carrier the moment the goods are received at its warehouse. We do not think that is law or that it ought to be."

Sec. 136. Same subject.—In the case of The Railroad Company *v.* Farmers' & Drovers', etc., Firm,[36] it appeared that several railroad companies, whose lines centered in a certain

36. 107 Ky. 53, 52 S. W. Rep. 972, citing Hutchinson on Carr.

city, agreed among themselves that whenever any of the companies should have a shipment of live stock to be transferred to any of the other lines for further transportation, delivery of the stock should be made to a stockyards company for the purpose of making the transfer. A shipment of stock was received by one company for the transportation over its own and one of such other lines. The stock, on arrival at the city, was delivered to the stockyards company for transfer to the connecting line. On account of the inability of the connecting line to furnish cars for the purpose of forwarding the stock, a delay occurred and the stock was damaged. No notice was given by the first carrier to the shipper of such delay. In an action against the first carrier for the damage thus caused the defense relied on was that the stock had been seasonably delivered to the stockyards company, and that its obligation to the shipper had therefore been performed. But it was held that although the stock at the time of the delay had been placed in the hands of the stock yards company in accordance with the agreement between the railroad companies, there had been no delivery by the initial company to the succeeding company such as to relieve the former company of the duty of notifying the shipper of the delay, and that it was therefore liable for the damage suffered.

Sec. 137. (§ 106.) Same subject—Cases holding delivery complete.—But in Converse *v.* The Transportation Company,[37] where it appeared that the carrier by whom the transportation was to be continued and the incoming carrier used the same depot, and that when the latter brought in freight for further transportation by the former, it was, by usage and the mutual understanding of the carriers, deposited upon a particular platform in the depot at the side of the track of the connecting carrier, which was considered and treated as a delivery to it, and that this was done in this instance by the defendant as soon as it arrived with the freight, it was held that this was such a delivery as to shift the liability for the further safety

37. 33 Conn. 166.

of the goods from the defendant which had thus deposited the goods, and that it could not therefore be made to account to the owner for their subsequent loss by fire. And in Pratt *v.* The Railway Company,[38] in which the facts were similar, the same conclusion was reached by the supreme court of the United States. But in both these cases the circumstances seemed to be regarded as constituting an actual delivery to the succeeding carrier, the agent of such carrier in the latter case having actual knowledge of the arrival of goods and of their having been deposited in the depot for further carriage by his road. To the same effect is the case of Washburn Crosby Co. *v.* The Railroad.[39] It there appeared that a railroad company had a pier at the end of its line, and that a steamship company which formed a connection with the railroad company at that point used and occupied a portion of the pier for the purpose of receiving freight deposited upon it by the railroad company and intended for further transportation on the steamship company's vessels. It also appeared that unloading freight in such manner was regarded by both companies as a delivery to the steamship company. A quantity of flour which the railroad company had unloaded on the pier to await transportation by the steamship company was destroyed by fire. Suit was brought against the railroad company for its value, and the question was whether the facts showed a delivery. In deciding the question, Holmes, C. J., said: "If it was understood in advance that as soon as goods were left on the wharf by the railroad company, the steamship company was free to take them at its pleasure, and that it was expected to take notice of their presence and to assume responsibility for them without more notification, the deposit of the flour on the wharf was an actual delivery without more." It was held, therefore, that a delivery had been shown, and that the railroad company was not liable.

Sec. 138. (§ 107.) Owner may recover for goods constructively delivered.—But it by no means follows that the owner of

38. 95 U. S. 43.

39. 180 Mass. 252, 62 N. E. Rep. 590. See also, Truax *v.* Railroad Co., 3 Houst. 233, 251.

the goods may not recover for the loss from the connecting carrier to whom they have been only constructively delivered. He is not obliged to look to him, and may pursue another in whom was the last actual possession. But if, as between the carriers themselves, the one to whom delivery has been constructively made for further carriage is the responsible party, there is no reason why he should not be liable also to the owner of the goods. Thus where goods were carried to the end of the first carrier's route and there placed in a warehouse to be farther transported by the defendants, to whom notice was given of the arrival of the goods and by whom they were entered upon their books for transportation, it being the course of business for the defendants to take goods deposited in the warehouse for them with notice without further delivery, it was held that they had become liable for the loss of the goods by an accidental fire after they had remained in the warehouse eight days awaiting removal. "In the present case," said the court, "the flour was not only deposited in the usual place, but notice was given to the defendants, who entered it upon their books. From this time it must be held to have been in the possession of the defendants as common carriers."[40]

Sec. 139. (§ 108.) First carrier as forwarding agent for owner.—When goods are delivered to the carrier for the purpose of being carried to a point beyond the terminus of its route, and for that purpose to be delivered by him to a connecting carrier in order to continue the carriage, or where it becomes necessary for that purpose to make successive deliveries from one to another upon a continuous line or succession of carriers, the first and each succeeding carrier becomes the agent of the owner of the goods to make delivery to the next carrier; and it is incumbent upon him to do so not only to relieve himself from further liability, but because it is a duty which he owes to the owner, and which he has assumed with the acceptance of the goods. He is the party in charge of

40. Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616.

them, and the only one with whom the succeeding carrier can make the necessary arrangements, and stands towards them for this purpose in the position of an owner.[41] Therefore, where there was a failure to deliver to such succeeding carrier, because one of his rules was that he would not receive goods for carriage without a written contract restricting his liability, which the carrier having the goods in possession did not feel authorized to accept, and therefore kept them in his warehouse for twenty days without offering them to the next carrier, or giving him notice of their arrival, and whilst he awaited directions from the consignee who had been informed of the fact, the goods were destroyed by fire, it was held that he should have tendered them to the next succeeding carrier, and that he would have been justified in delivering the goods and accepting on behalf of their owners the usual terms required by the succeeding carrier; and that not having done so, he continued to hold the goods as a carrier, and was liable for their loss.[42] In such cases, it is said that the owner constitutes the carrier his forwarding agent to deliver to the succeeding carrier, and becomes himself responsible for his acts in the execution of the agency.[43]

Sec. 140. Same subject—Duty of first carrier to forward shipping directions.—If the first carrier receives the goods from the owner with instructions or directions as to their

41. Nelson *v.* The Railroad, 48 N. Y. 507; Squire *v.* The Railroad, 98 Mass. 240; York Co. *v.* Central R. R., 3 Wall. 113; Railrcad Co. *v.* Foulks, 191 Ill. 57, 60 N. E. Rep. 890, *affirming* 92 Ill. App. 391, citing Hutchinson on Carr.; Taylor *v.* Railroad Co., 87 Me. 299, 32 Atl. Rep. 905.

42. Rawson *v.* Holland, 59 N. Y. 611.

43. Briggs *v.* The Railroad, 6 Allen, 246. In Sherman *v.* Hudson R. R. Co., 64 N. Y. 255, it is said that neither company is an agent of the owner; each exercises an independent employment as a contractor with the owner, and is responsible for its own negligence, but it cannot make the owner responsible for the negligence of a connecting road. To like effect, see Dunham *v.* Boston, etc., R. Co., 70 Me. 164. A carrier acts as agent of the owner in turning the goods over to the connecting carrier, and not as agent of the latter. Marquette R. R. *v.* Kirkwood, 45 Mich. 51.

ultimate delivery or disposition, or relative to their safe and seasonable delivery at destination, it is his duty as the forwarding agent of the owner to see that such instructions are given to the succeeding carrier to whom he delivers the goods for further transportation.[44] Thus if the first carrier directs the goods to a destination other than the one requested by the owner, and in consequence the shipment is delayed, he will be liable although he has provided in his contract that he will assume no liability for loss or damage beyond the terminus of his own line.[45] So if he misdirects the goods, and they are forwarded to a wrong destination and thereby lost, or if, without sufficient cause, he selects an unusual or circuitous route whereby the freight charges are greater than they would have been had he selected the ordinary and more direct route, he, and not the succeeding carrier will be responsible. And under such circumstances, the connecting carrier is not required to delay the reception or forwarding of the goods until he can ascertain whether or not the owner and the first carrier have stipulated the terms of shipment, and if so, what those terms are and whether the preceding carrier has complied with them; or, if no terms are stipulated, whether the preceding carrier has in all things faithfully and honestly discharged his duty as the owner's forwarding agent.[46] And it has been held that if the first carrier by his contract undertakes to forward the goods over several connecting lines, it is his duty, although he has expressly limited his liability as a common carrier to his own route, to see that each successive carrier is notified of the conditions under which the shipment is made.[47]

Sec. 141. (§ 109.) Carrier cannot become warehouseman of the goods while they are in transit.—No higher degree of re-

44. North *v.* Transportation Co., 146 Mass. 315; Colfax Mountain Fruit Co. *v.* The Railroad, 118 Cal. 648, 46 Pac. Rep. 668; *s. c.* 50 Pac. Rep. 775.

45. Railroad Co. *v.* Southern Seating & Cabinet Co., 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. Rep. 933, 50 L. R. A. 729.

46. Glover *v.* The Railroad, 95 Mo. App. 369, 69 S. W. Rep. 599, citing Hutchinson on Carr.

47. Colfax Mountain Fruit Co. *v.* The Railroad, *supra.*

sponsibility, of course, rests upon the carrier while the goods are en route than when they have arrived at destination, so long as he stands to them in the relation of carrier. But when the question occurs whether by his course of dealing with them he has divested himself of that responsible relation, somewhat different considerations arise and somewhat different rules are to be applied when the goods are in *itinere*, from those which govern when the transit is brought to an end by their arrival at destination. As has been said, "the owner loses sight of his goods when he delivers them to the first carrier and has no means of learning their whereabouts till he or the consignee is informed of their arrival at destination. At each successive point of transfer from one carrier to another they are liable to be placed in warehouses, there perhaps to be delayed by the accumulation of freight or other causes and exposed to loss by fire or theft, without fault on the part of the carrier or his agent. Superadded to these risks are the dangers of loss by collusion, quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule the storing of the goods under such circumstances should be held to be a mere accessory to the transportation, and they should be under the protection of the rule which makes the carrier liable as an insurer from the time the owner transfers their possession to the first carrier until they are delivered to him at the end of the route."[48] But when they have reached their destination nothing more generally remains to be done by

48. McDonald *v.* The Railroad, 34 N. Y. 497. See also, Lewis *v.* The Railway, 47 W. Va. 656, 35 S. E. Rep. 908, 81 Am. St. Rep. 816; Southard *v.* The Railway, 60 Minn. 382, 62 N. W. Rep. 442.

The owner of goods who delivers them under a contract of shipment to a carrier for transportation over two or more connecting lines does not contemplate or make a contract for storage. His contract is for carriage, and until the goods reach their final destination, he has a right to a continuous carrier's duty and responsibility which cannot, without his consent, be changed to the duty and responsibility of a warehouseman however convenient such a course may be for the carrier. Wehman *v.* The Railway, 58 Minn. 22, 59 N. W. Rep. 546.

the carrier after storing them and giving notice of their arrival to the consignee, and after allowing a reasonable time for their removal he becomes a mere warehouseman; and if after that they are destroyed without his carelessness or negligence, the loss must be borne, as in equity it should be, by the owner.

Sec. 142. (§ 110.) Same subject.—This distinction has been expressly recognized and asserted by the supreme court of the United States in the case of The Railroad Company *v.* The Manufacturing Co.,[49] in which it is said that "there is a clear distinction, in our opinion, between property in a situation to be delivered over to the consignee on demand and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter to be awaiting transportation." And the same principle may be said to be indirectly recognized in most of the cases in which the duty of delivery to the connecting carriers has been discussed.[50]

49. 16 Wall. 327.

50. The case of Ouimit *v.* Hen. shaw, 35 Vt. 605, is an instructive case upon the subject of the duties of carriers in making delivery of goods to connecting carriers for further carriage; and though in relation to the baggage of a passenger, the same reasons apply more forcibly to goods in the hands of the common carrier. In this case it was known to the incoming road that the baggage was to be forwarded upon another, which did not immediately connect with it, however, either in time or place. The baggage was therefore stored by the agent of the first road until the next morning, the time for the starting of the connecting train, according to the custom of the road and at the request of the passenger, who was assured that it would be safe. In the morning the baggage could not be found and the road was held liable. It was said by the court that in such cases whenever the two roads connected in the same depot and the departure of the succeeding train was contemporaneous with the arrival of the incoming one, it was the duty of the latter to transfer the baggage to the outgoing train if so directed by the owner, or if it were known to its agent that the transportation was to be continued upon that train; and that if there was not a close connection between them, and a necessary detention for a short time, the custody of the first road must be held to continue, unless otherwise desired by the passenger, until the time for the departure of the second; nor would the relation of the carrier, it was said, be changed by the fact that the baggage was stored by it in its store-room while awaiting the de-

Sec. 143. (§ 111.) Of the carrier's duty to accept and carry the goods.—It has been already stated in giving the definition of a common carrier that the obligation to accept the goods when they are tendered to him for carriage is an essential element of his character, and that if there be no such obligation he is not a common carrier although he may carry for hire. But this is only a general statement of the law. There are goods which he is not bound to carry at all, and there may be circumstances which will excuse him from carrying goods even of the kind which he is engaged generally in carrying and which generally he is bound to carry. He may therefore sometimes lawfully refuse to accept the goods; and as the delivery to him necessarily implies his acceptance, it involves the inquiry when such acceptance may be refused by him without subjecting himself to an action for so doing.

Sec. 144. (§ 112.) Same subject—Not obliged to accept goods of a kind he does not profess to carry.—It has been already observed that no common carrier is a carrier of all kinds or classes of goods.[1] This would be impossible. Therefore before he can be made liable to damages for a refusal to carry such as are offered to him for that purpose, it must be

parture of another train. And it was stated as one of the reasons for this conclusion that what would constitute a delivery when the goods had arrived at destination would not necessarily do so when the baggage was still in transit, and that although the circumstances might have been held to amount to a delivery and to have changed the relation of the road to that of warehouseman, if it had not been known that the baggage was to be forwarded, it did not do so when this fact was known to the agent of the road.

It should be observed in reference to this subject that the English cases throw no light upon it, inasmuch as there, what is known as the rule of Muschamp's Case, which makes the first or contracting carrier solely responsible for the goods to the end of the transit, and which will be hereafter explained, prevails.

1. See *ante*, §§ 59, 90.

But a railroad company cannot refuse to transport coal on the ground that it is of an inferior quality, and its introduction into the market would injuriously affect the reputation of the coal market from that section, and so injure and decrease the carrying business of the road. Olanta Coal Min. Co. *v.* Railroad Co., 144 Fed. 150.

made to appear that they were of the kind which he usually carried, or which, by his public profession, he was bound to accept for that purpose. The law will only impose the obligation upon him in this respect co-extensive with the public expectations which he has created by his course of business or the invitations he has publicly held out to those who may solicit his services. But it being a matter of universal knowledge that certain classes of carriers engaged generally in the carriage of certain kinds of goods, when the kind of carrier and the nature of the goods are designated, notice will in most cases be judicially taken whether the particular goods are of the kind which those of the class to which the carrier belongs usually carry; and if they be, the presumption at once arises that he was under a legal obligation to accept and carry them. But still there may be many cases in which it cannot be known from common experience nor from the character of the business in which the carrier is engaged whether the particular goods are such that he, as a common carrier, is under a legal obligation to accept them for carriage, and in such cases it would devolve upon the party who insisted upon his liability for the refusal, to show from the nature of the employment, or from the usage of others similarly engaged, or from the previous practice or course of business of the particular carrier himself, that the duty to accept was incumbent upon him. And even when from public notoriety or from the evidence which may be adduced, the presumption arises that the carrier has unlawfully refused to accept or to carry the goods, it is still competent for him to show that although the goods are of the kind which carriers like himself are usually bound to carry, he has exonerated himself from the obligation to do so by public notice or by his previous conduct in his business.

Sec. 145. (§ 113.) Reasons which will justify refusal to accept.—So he may show other reasons for his refusal which will legally excuse him. He may, for instance, lawfully refuse to receive them if they are improperly packed, or if they are

otherwise in an unfit condition for carriage.[2] Or he may show that the goods offered were of a dangerous character, which might subject him or his vehicle, or strangers or his passengers, or his other freight, to the risk of injury.[3] And he may even refuse packages offered to him without being made acquainted with their contents, when there is good ground for believing that they are of a dangerous character.[4] But he would have no right, unless from the appearance of the package or from other circumstances his suspicions are reasonably aroused as to its contents, to require the owner who offered it for carriage to disclose their nature. But when such is the case, it would not only be his right but his duty to ascertain the truth, and if they proved to be of such a dangerous character, to refuse them.[5]

Sec. 146. (§ 114.) Same subject—Press of business may justify refusal. He may also legally refuse to carry the goods or to accept them for carriage, if having provided himself with equipments and facilities for doing such an amount of business as, from previous experience, he might reasonably expect, he finds that, from unexpected temporary causes, its great accumulation, or the press of business as it is called, has made it impossible for him to carry the goods; or if, as it is expressed in some of the old cases, his coach be full, he may refuse to receive them and thereby subject himself to the responsi-

2. Union Ex. Co. *v.* Graham, 26 Ohio St. 595; Railway Co. *v.* A. B. Frank Co. (Tex. Civ. App.), 48 S. W. Rep. 210, citing Hutchinson on Carr.

3. The carrier is not bound to accept for carriage goods which are likely to injure goods already received for carriage. The Nith, 36 Fed. Rep. 86; 2 Pars. Cont. 174. Nor is he bound to accept such articles as nitroglycerine, dynamite, gunpowder, oil of vitriol and the like. California Powder Works *v.* The Railroad, 113 Cal. 329, 45 Pac. Rep. 691, 36 L. R. A. 648, citing Hutchinson on Carr.

A railroad company is not liable in damages for refusing to transport a dead body where the transit permit is not in accordance with the rules and requirements of the state board of health. Railroad Co. *v.* James, 10 Ind. App. 550, 35 N. E. Rep. 395; *s. c.* 38 N. E. Rep. 192.

4. The Nitro-glycerine Case, 15 Wall. 524.

5. The Nitro-glycerine Case, 15 Wall. 524.

bility of their safe custody, until he may be in a condition to transport them.[6]

Sec. 147. (§ 115.) Same subject—Other reasons.—So he may of course refuse to take the goods if he does not carry to the place to which the owner wishes to send them,[7] unless, as has been held, such place is upon the line of a connecting carrier with whom he has an established method of doing business. Under such circumstances, he would be bound to accept the goods for carriage to the point of transfer and make delivery according to the usual course of business between them.[8] But if the goods are brought to him at an unreasonable hour, or at a place other than that which he has appointed for their delivery to him, as if they be offered to the agent of a steamboat, railroad or express company upon the street or at any place other than the boat or office where it is advertised and known that such business is transacted, or if they are offered at a time unreasonably long before the accustomed or appointed time for his departure, he will be excused for refusing to receive them.[9] So it will be a good excuse for refusing them if at the particular time when they are offered

6. Peet *v.* The Railway, 20 Wis. 594; Lovett *v.* Hobbs, 2 Shower, 127; Riley *v.* Horne, 5 Bing. 217.

Where a railroad company, by reason of a strike of the miners at the coal mines from which it had been accustomed to obtain a large part of the coal which it used in the operation of its road, was compelled to send to more distant fields for a supply, thus making it necessary for it to withdraw its coal engines and cars from that line of road and use them in freighting coal for its own consumption, such facts will constitute a sufficient excuse for its refusal to furnish the owners of a coal mine on that line of its road with engines and cars for the transportation of their coal. Railroad Co. *v.* Queen City Coal Co., 13 Ky. Law Rep. 832.

7. Pitlock *v.* Wells, Fargo & Co., 109 Mass. 452.

8. Inman *v.* Railroad Co., 14 Tex. Civ. App. 39, 37 S. W. Rep. 37; Seasongood *v.* Transportation Co., 21 Ky. Law Rep. 1142, 54 S. W. Rep. 193, 49 L. R. A. 270.

9. Pickford *v.* The Railway, 12 M. & W. 766; Lane *v.* Cotton, 1 Ld. Raym. 652; Story on Bail. § 508; Cronkite *v.* Wells, 32 N. Y. 247.

The carrier has the right to make reasonable regulations, applicable alike to all shippers, as to the manner in which a commodity such as coal will be received for transportation. This power to make reasonable regulations as to the manner and place where he

the way is exposed to extraordinary danger, or if the goods are of such a character that they would be exposed to the fury of a mob or to destruction by any kind of popular outbreak; for while the destruction or loss of the goods from any of these causes would be no defense against the liability of the common carrier, the law will not require him against his will to expose himself to the risk.[10]

Sec. 148. (§ 115a.) Same subject—Not obliged to accept from one not authorized to deliver—Liability where he does.—Before accepting the goods for carriage the carrier may also insist upon evidence that the person offering them has authority to do so, for he is bound to receive and carry goods only when offered for carriage by their owner or his authorized agent.[11] And if he does accept goods for carriage in good faith from a person, not the owner, but in apparent control of them and able immediately to assume the actual custody of them, and, after carriage to the destination, delivers them again to such person, he is not liable to the true owner as for a conversion.[12]

will receive such commodities for shipment implies the power to change and modify the regulations thus made upon reasonable notice to the public. Harp *v.* The Railroad, 125 Fed. 445, 61 C. C. A. 405, *affirming*, *s. c.* 118 Fed. 169; Robinson *v.* Railroad Co., 129 Fed. 758, 64 C. C. A. 281.

10. Edwards *v.* Sherratt, 1 East. 604. Thus it was held that where during the late war and on account thereof it was not safe for a railroad company to undertake the carriage of goods, it was not liable for refusing to carry. Phelps *v.* Railroad Co., 94 Ill. 548; Illinois R. R. Co. *v.* McClellan, 54 Ill. 58; Same *v.* Ashmead, 58 Ill. 487; Same *v.* Cobb, 64 Ill. 128; Same *v.* Hornberger, 77 Ill. 457.

11. Fitch *v.* Newberry, 1 Doug. (Mich.) 1.

12. Gurley *v.* Armstead, 148 Mass. 267. Said Devens, J.: "The defendant, who was a job-teamster, removed the goods alleged to have been by him converted, from a room in the dwelling-house of one Whittier to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not for storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did, the defendant acted in good faith, without any intention of depriving the rightful owner of her property, and in ig-

But if he be directed by the owner to call at a certain place to obtain the goods for the purpose of being forwarded over his line, and in so doing he takes by mistake the goods of another, there is neither a delivery by the owner nor one having appar-

norance of the fact that the plaintiff was such owner, neither asserting title in himself nor denying title to any other, nor exercising any act of ownership except by the removal above stated.

"The legal possession of the goods was, under these circumstances, undoubtedly in the plaintiff, and as they were in the room hired by her, the actual possession was also hers. The apparent control of them was, however, in Whittier, as they were in his house, and he had further the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

"It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them. Strickland *v.* Barrett, 20 Pick. 415; Leonard *v.* Tidd, 3 Met. 6. And this would be so, apparently, even if the goods thus received were restored to the wrongful possessor, after notice of the claim of the true owner. Loring *v.* Mulcahy, 3 Allen, 575; Metcalf *v.* McLaughlin, 122 Mass. 84.

"Upon the precise question raised, we have found no direct authority, nor was any cited in the argument; but the principle on which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himelf have done by virtue of his wrongful possession.

"The defendant was a job-teamster, and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances. Buckland *v.* Adams Express Co., 97 Mass. 124; Judson *v.* Western Railroad, 6 Allen, 426. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant, upon well established authority, would have been justified in obeying the order, and transporting the goods to

ent possession or control over them, and he will be liable to the owner for the conversion.[13]

Sec. 149. (§ 115b.) Remedy for wrongful refusal.—If the carrier refuses without lawful reason to accept and carry the goods, the owner may maintain an action against the carrier for the damages sustained by such wrongful refusal.[14] This remedy by action is usually adequate to secure the plaintiff's rights, and, therefore, in accordance with well settled principles, *mandamus* will not lie to enforce the performance of the duty.[15] Where, however, the duty was expressly imposed by statute, and the refusal was continuing and the injury irreparable, a mandatory injunction was granted to secure performance.[16] And in Blumenthal *v.* Railway Company it was held that where the goods were in reasonable and proper condition for shipment a mandatory injunction would be granted enjoining the carrier from refusing to carry the goods.[17]

Sec. 150. (§ 116.) Carrier may demand prepayment of freight.—The carrier may also require a prepayment of his

Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immediately taking them into his actual custody by entering the room through the unlocked door, has directed the removal.

"If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control."

See also, White Live Stock Commission Co. *v.* Railroad Co., 87 Mo. App. 330.

13. Edwards *v.* Express Co., 121 Iowa, 744, 96 N. W. Rep. 740, 63 L. R. A. 467, citing Hutchinson on Carr.

14. See *ante*, § 62.

15. People *v.* Railroad Co., 22 Hun, 533; People *v.* Babcock, 16 Hun, 313.

16. Chicago, etc., R'y Co. *v.* Burlington R'y Co., 34 Fed. 481; Southern Ex. Co. *v.* R. M. Rose, — Ga. —, 53 S. E. Rep. 185, citing Hutchinson on Carr.

17. 84 Fed. 920.

freight, and may refuse to carry the goods unless it is paid. While the law compels him from motives of public policy to deal with all persons, and leaves him no choice as to his customers, it does not bind him to deal on credit, and he may demand the price of his labor before it is performed. But, in a declaration against him for his refusal, it is not necessary to aver a tender of the money for the freight. It is sufficient to aver a readiness and willingness to pay.[18] A demurrer does not lie to such a declaration because it does not appear therefrom that the payment was demanded in advance and the carrier might have been willing to trust the owner of the goods; and therefore it is enough to say that he was ready and willing, which means that he would have paid had the carrier demanded the freight. As said by Baron Parke: "Whenever a duty is cast upon a party in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay, or be ready to pay the money, when the other is ready to undertake the duty. The money is not required to be paid down until the carrier receives the goods which he is bound to carry." It would seem, therefore, that in order to show his readiness to undertake the duty, the carrier must accept the goods before he demands his freight, but may refuse to carry until such payment; and if the owner refuse to pay, the carrier would hold them until returned to the owner merely as a depositary, because something would remain yet to be done to put him in the relation of carrier to them. If not demanded and not required by any rule or regulation of the carrier known to the owner of the goods, no tender need be made of the carrier's charges, and he may be sued for his refusal without such tender.

Sec. 151. (§ 117.) Actual acceptance may waive reasons for refusal.—Although, however, the carrier may in these cases refuse to accept the goods, if he take them into his possession

18. Pickford *v.* The Railway, 8 M. & W. 372; Bastard *v.* Bastard, 2 Shower, 81; Railway Co. *v.* Perishow & Newman, 61 Ill. App. 179. See also, *post*, § 1344.

for the purpose of carriage without insisting upon his right to refuse them, he will be considered as waiving it and consenting to accept the goods upon the usual terms as to liability, and will become responsible as an insurer as in other cases.[19] But to impose upon him such extraordinary liability for goods which from the nature of his business he was not bound to carry, or which were in an unfit condition to be carried, or which for any reason it would be unfair to require him to carry, an actual acceptance for the purpose of the carriage must be shown; and it will not be done where the delivery is merely constructive.

II. THE BILL OF LADING.

Sec. 152. (§ 118.) No receipt, bill of lading or other writing necessary.—No receipt, bill of lading or writing of any kind is required to subject the carrier to the duties and responsibilities of an insurer of the goods.[20] As soon as they are deliv-

19. The David, 5 Blatch. 266; Hannibal, etc., R. R. *v.* Swift, 12 Wall. 262; Pickford *v.* The Railway, 12 M. & W. 766; Porcher *v.* The Railroad, 14 Rich. (Law), 181; Railroad Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. Rep. 296; Railroad Co. *v.* Allgood, 113 Ala. 163, 20 So. Rep. 986; Express Co. *v.* U. S. Express Co., 88 Fed. 659; *s. c.* 92 Fed. 1022, 35 C. C. A. 172; Evans *v.* The Railroad Co., — Ky. —, 90 S. W. Rep. 588.

Thus in the case of Railway Co. *v.* Webb, 103 Ky. 705, 46 S. W. Rep. 11, it appeared that a carrier accepted for transportation a shipment of live stock at a time of unusual drought and water failure. Owing to the inability of the carrier to supply the stock with sufficient water it depreciated in value. It further appeared that the carrier accepted the stock with full knowledge of the weather conditions then prevailing. In an action by the owner to recover damages, it was contended by the carrier that the water failure was an act of God for which it should not be held responsible. The court, however, held that, while the carrier under such circumstances might have been justified in refusing to accept the stock for transportation, yet, having done so, with full knowledge of the difficulties to be encountered, it was liable for the injury.

20. A parol contract is sufficient. Texas Pac. R'y Co. *v.* Nicholson, 61 Tex. 491. See also, *post*, § 1313.

Where a common carrier has orally agreed to ship goods, it is not necessary to have a shipping bill or contract in writing in order to make his liability, as such, complete. Meloche *v.* Railway Co., 116

ered to him for present carriage and nothing necessary to their being forwarded remains to be done by the owner, the law imposes upon him all the risk of their safe custody as well as the duty to carry as directed. He is regarded as exercising in some sort the functions of a public office, and the law is said to impose upon him his duties and obligations upon this ground as well as upon the ground of the contract, and as soon as the delivery to him and his acceptance are shown, the law imposes the duty and responsibility in virtue of his public employment. In other words, his liability does not rest exclusively upon contract, however much it may be qualified or limited by express agreement.

Sec. 153. (§ 119.) Liability of carrier usually limited by contract.—He was always allowed, however, if a carrier by water, to enter into contracts by which he might exempt himself from the risks of certain perils. But carriers by land had formerly no such privilege in this country; and such was the jealousy with which they were regarded, that it was held impossible for them to guard themselves by any stipulations whatever against liability from loss arising from any other cause than the act of God or the public enemy. This harsh condition has, however, been greatly changed in the carrier's favor, as we shall hereafter see;[21] and now, not only is he permitted to contract so as to change the extent of his liability as fixed by the common law, but such contracts when made with his employers become almost entirely the measure of his responsibility. And this custom has become so universal in transactions with carriers that his liability may now be said to depend almost exclusively upon contract. He still stands, however, in the relation of common carrier to the goods intrusted to him, notwithstanding his contract, however much

Mich. 69, 74 N. W. Rep. 301. See also, Berry *v.* Railway Co., 122 N. Car. 1002, 30 S. E. Rep. 14; Martin *v.* Railway Co., 3 Tex. Civ. App. 556, 22 S. W. Rep. 1007, citing Hutchinson on Carr.; Railway Co. *v.* Beard (Tex. Civ. App.), 78 S. W. Rep. 253; Railway Co. *v.* Darby, 119 Ala. 531, 24 So. Rep. 713, citing Hutchinson on Carr.

21. See *post*, chapter VII.

it may lessen his common-law liability, and he cannot, even by the most express contract, divest himself of that character and change it to that of a mere private carrier or ordinary bailee.[22]

Sec. 154. (§ 120.) Contracts vary in form and name.—These contracts assume somewhat different forms and are known by different names according as they may be with carriers by water or carriers by land. Those with the former are called bills of lading, while those with land carriers are commonly called receipts. They are, however, the same in effect, and are intended merely to evidence the true intent of the transaction between the parties. In both cases they contain a description of the goods, an acknowledgment that they have been received by the carrier, the names of the shipper and consignee, the place of consignment, that they are in good condition, the terms of the carriage and such qualifications of the liability of the carrier as he and the shipper may have agreed upon, and the contract to carry to destination and there deliver to the consignee. They must be signed by the carrier or his authorized agent to bind him,[23] and must be accepted by the shipper. And any contract with the carrier having these characteristics is entitled to the effect of a bill of lading, no matter how informally it may be drawn.

Sec. 155. (§ 121.) Variance in duplicates—Shipper's controls.—A ship's bill of lading is usually made out in triplicate, one being retained by the shipper, another sent by him to his consignee and the third retained by the master of the vessel. In case of difference between these parts, the one retained by the master is of inferior weight, as evidence of what the con-

22. See *ante*, § 44.

Also Ballou *v.* Earle, 17 R. I. 441, 22 Atl. 1113, 33 Am. St. Rep. 881, 14 L. R. A. 433, citing Hutchinson on Carr.

23. The Brittannia, 87 Fed. 495; Patrick *v.* Railway Co., — Ind. Terr. —, 88 S. W. Rep. 330, *reversed on another point in* Railway Co. *v.* Patrick, — C. C. A. —, 144 Fed. 632. Though the receipt given is signed by the carrier only, the shipper, when he accepts it, becomes a party to it and bound by its terms. Express Co. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. Rep. 412, citing Hutchinson on Carr.

tract was, to those delivered to the shipper, that retained by the master being designed, it is said, only for information and convenience and not as evidence between the parties of what their contract was. If it differs from the others they must be considered as the true and only evidence of the contract.[24] And the same rule applies to duplicates issued by other carriers,—in case of variance that delivered to the shipper controls.[25]

Sec. 156. Variance between charter party and bill of lading.—As between the shipowner and one who charters the ship, the charter party, although in parol, will control a bill of lading which is inconsistent with it and which contains no reference to the charter party. In such a case, the bill of lading will neither operate as a new contract, nor as a modification of the terms of the charter party.[26] But as between the shipowner and a shipper other than the charterer, if it appear that such shipper had no notice of the terms of the charter party until after his contract with the ship had been made, he will not be bound by the terms of the charter party, and his contract will be controlled by the bill of lading issued to him.[27]

Sec. 157. (§ 122.) Bills of lading are both receipts and contracts to carry.—Such instruments are both receipts and contracts.[28] So far as they acknowledge the delivery and acceptance of the goods, they are mere receipts. As to the rest, they are contracts and are binding as such on the parties to them. In both characters they are of great importance to both shipper and carrier.

24. The Thames, 14 Wall. 105.

25. Ontario Bank *v.* Hanlon, 23 Hun, 283.

26. The Iowa, 80 Fed. 933; Huron Barge Co. *v.* Turney, 71 Fed. 972 *and* 79 Fed. 109.

27. The Titania, 131 Fed. 229, 65 C. C. A. 215, *affirming* 124 Fed. 975.

28. Pollard *v.* Vinton, 105 U. S. 7; Planters', etc., Mfg. Co. *v.* Elder, 101 Fed. 1001, 42 C. C. A. 130; The Tongoy, 55 Fed. 329; Railway Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. Rep. 480; Mears *v.* Railroad Co., 75 Conn. 171, 52 Atl. Rep. 610, 96 Am. St. Rep. 192, 56 L. R. A. 884; Railroad Co. *v.* Simon, 160 Ill. 648, 43 N. E. Rep. 596, citing Hutchinson on Carr.

Sec. 158. Same subject—As receipts, not conclusive.—In so far as bills of lading acknowledge that the carrier has received the goods, or that he has received the quantity named, they are like all other receipts and may be shown to have been given by mistake and not to speak the truth.[29] For it has been repeatedly held that all receipts and admissions are open as between the parties to explanation, and are impeachable for any mistake, error or false statement contained in them, and may be contradicted, varied or explained by parol testimony; and that so much of the bill of lading as relates only to the receipt of the goods, the quality, condition and quantity, which is treated as distinct from the contract, comes within this rule. But it is said to be very high and authentic evidence of both the quantity and condition of the goods when they were received, though not an estoppel to show the truth.[30]

29. Elm Staves' Case, 21 Fed. Rep. 590; Abbe *v.* Eaton, 51 N. Y. 410; Hazard *v.* Railway Co., 67 Miss. 32, 7 S. Rep. 280; Railway Co. *v.* Moline Plow Co., *supra;* The Titania, 65 C. C. A. 215, 131 Fed. 229, *affirming* 124 Fed. 975; Planters' Fertilizer Mfg. Co. *v.* Elder, *supra;* Cunard S. S. Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310, *s. c.* 126 Fed. 610, 61 C. C. A. 532, *reversing* Kelley *v.* Cunard S. S. Co., 120 Fed. 536.

A statute making the specification of weights in bills of lading issued by railroad companies for hay, grain, etc., shipped over their lines, conclusive evidence of the correctness of such weights, is unconstitutional because denying to the railroad companies due process of law, and because depriving the courts of their judicial power to determine the weight and sufficiency of evidence. Railway Co. *v.* Simonson, 64 Kan. 802, 68 Pac. Rep. 653, 91 Am. St. Rep. 248, 57 L. R. A. 765, citing Hutchinson on Carr.

30. Ellis *v.* Willard, 5 Seld. 529; Meyer *v.* Peck, 28 N. Y. 590; The Delaware, 14 Wall. 601; The Lady Franklin, 8 *id.* 325; Abbe *v.* Eaton, 51 N. Y. 410; Dean *v.* King, 22 Ohio St. 118; The Loon, 7 Blatch. 244; Fellows *v.* Str. Powell, 16 La. Ann. 316; Sears *v.* Wingate, 3 Allen, 103; Hunt & Macauley *v.* The Railroad, 29 La. Ann. 446; Baltimore, etc., Railroad *v.* Wilkins, 44 Md. 11; National Bank *v.* Walbridge, 19 Ohio St. 425; Louisiana Bank *v.* Laveille, 52 Mo. 380; Fasy *v.* Navigation Co., 79 N. Y. Supp. 1103, 77 App. Div. 469; *affirmed without opinion*, 177 N. Y. 591, 70 N. E. Rep. 1098; Davis *v.* Railroad Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; Railway Co. *v.* McFadden, 154 U. S. 155, 14 Sup. Ct. R. 990, 38 L. Ed. 944, citing Hutchinson on Carr.

Sec. 159. Authority of agent to sign bills of lading.—The agent of the carrier can sign such contracts only when he has authority to do so, and he has no such authority when the goods are not actually delivered to him. In an early case[31] it was said that "owners can never be liable but in respect of the delivery of goods to a ship trading for hire where the delivery to the master is a delivery to the owners, and where the owners can, in respect of such delivery, have an action for freight; for you must show a benefit accruing to the person against whom you bring your action, or else a special undertaking." And in an action against the owners of a ship it was argued before the court of king's bench that none of the defendants were entitled to disprove the shipment because the bill of lading, signed by the master, asserted the shipment. But the court held the evidence showing that the goods were not shipped on board the vessel at all, admissible, and that there was no ground for saying that the defendants were estopped by the bill of lading from showing this to be the fact.[32] In another case it was said that "the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and a party taking a bill of lading, either originally or by indorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it."[33] And the English courts have had occasion to affirm the doctrine in a number of subsequent cases.[34]

31. Boucher *v.* Lawson, Cas. T. Hardw. 200.

32. Berkley *v.* Watling, 7 Ad. & El. 29.

33. Grant *v.* Norway, 10 Com. B. 665.

34. Hubbersty *v.* Ward, 8 Exch. 330; Coleman *v.* Riches, 16 Com. B. 104; Brown *v.* Coal Co., L. R. 10 C. P. 562; McLean *v.* Fleming, L. R. 2 H. L. Sc. 128; Cox *v.* Bruce, 18 Q. B. Div. 147; Bates *v.* Todd, 1 Moo. & R. 106; Meyer *v.* Dresser, 16 Com. B. (N. S.) 646; Berkley *v.* Watling, 7 Ad. & El. 29; Jessel *v.* Bath, L. R. 2 Exch. 267.

The master of a ship has no authority to grant bills of lading for goods which are not put on board his vessel. But when he signs a bill of lading acknowledging the receipt of a specific quantity of goods, the ship-owner is bound to deliver the whole amount speci-

Sec. 160. (§ 123.) Liability of carrier when goods not received, but receipt given.—The principle that the agent of a common carrier has no authority to sign bills of lading unless the goods have been actually delivered to him is also well settled in this country. Where, therefore, a bill of lading is signed by the agent when no goods are in fact received, evidence showing that the goods described were not delivered to the carrier as well as the circumstances under which the bill of lading was issued will be admissible. The leading case is that of The Schooner Freeman *v.* Buckingham,[35] in which the attempt was made in a court of admiralty to hold the vessel upon a bill of lading under the maritime rule that the ship is bound to the cargo. It appeared that the goods were never delivered on board the schooner as recited in the bill of lading, but that the master of the vessel had been induced by fraud and misrepresentation to sign it. It was held that the responsibility of the owner and the liability of the ship itself were convertible terms, the vessel not being liable if the owners were not; and that the master having signed the bill of lading without having received the goods, there having been in fact no such goods, had acted without authority, and that therefore neither the ship nor the owner could be held liable, although the libelant had advanced his money upon the faith of the bill of lading without any knowledge of the fraud, and was therefore a *bona-fide* holder for a valuable consideration. In a later case[36] in the same court, Mr. Justice Miller, speaking of the nature and effect of a bill of lading, said: "It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a

fied, unless he can show that the whole amount, or some part of it was in fact not shipped. If the owner is able to make such proof, he is, to that extent, relieved from the obligation which would otherwise attach to him under the bill of lading. Smith *v.* Navigation Co. (1896), App. Cas. 70, 65 L. J. P. C. 8.

35. 18 How. 182.

36. Pollard *v.* Vinton, 105 U. S. 7.

contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.''[37]

Sec. 161. (§ 124.) Same subject—How in case of bona fide holder.—By the weight of authority in the United States, it is held that bills of lading and other similar contracts of affreightment which are signed by the carrier's agent when no goods are in fact delivered to him are void even as to innocent and *bona fide* holders; and the reason for the rule is said to be that, the master or agent having no authority to sign them until the goods are actually delivered, they are nullities as to the party who has obtained them, and, bills of lading not being negotiable instruments, the assignor can confer no greater right than he himself has; and for the further reason that the holder having advanced upon them innocently,

37. See, Iron Mt. R'y Co. *v.* Knight, 122 U. S. 79; Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11; Miller *v.* The Railroad, 90 N. Y. 430; American Sugar Refining Co. *v.* Maddock, 93 Fed. Rep. 980, 36 C. C. A. 42; The Willie D. Sandhoval, 92 Fed. Rep. 286; Lazard *v.* Merchants' & Miners' Transportation Co., 78 Md. 1, 26 Atl. Rep. 897; Railroad Co. *v.* Nat'l Live Stock Bank, 178 Ill. 506, 53 N. E. Rep. 326, *reversing* 59 Ill. App. 451; Steamship Co. *v.* Kelley, 126 Fed. Rep. 610, 61 C. C. A. 532, *reversing* Kelley *v.* Steamship Co., 120 Fed. Rep. 536, where bills of lading for goatskins were issued by the agent of the vessel while the goods were in the warehouse, and sheepskins were fraudulently substituted in a number of bales.

Sec. 4 of the Harter Act (27 Stat. L. 445), provides that it shall be the duty of the owner, master or agent of any vessel transporting merchandise to issue a bill of lading stating, among other things, the quantity of goods received, and that the same shall be *prima facie* evidence of the receipt of the merchandise described in it. *Held*, that the construction of this section did not alter the rule previously existing in the federal courts, and that a false bill of lading was not binding on the owner or the ship. The Isola di Procida, 124 Fed. Rep. 942. See also, Campania Naviera Vascongada *v.* Churchill & Sim (1906), 75 L. J. K. B. 94.

But the carrier may cure the invalidity of the bill of lading by subsequently receiving the goods described in it. The Idaho, 93 U. S. 575, 23 L. Ed. 978; Robinson *v.* Railway Co., 16 Fed. 57; The Farwell, 8 Biss. 64, Fed. Cas. No. 8, 426.

being misled by the act of the master or agent, he must be the sufferer, upon the principle that when two parties are equally innocent, he who has reposed confidence and thus brought loss upon himself must bear it.[38] But, as will be seen in the following section, this rule has not been uniformly followed, and is opposed by courts of eminence and by reasons of great cogency.

Sec. 162. Same subject—The contrary view.—Other courts, however, have refused to sanction the rule as followed by the supreme court of the United States, and hold that where the carrier's agent signs a bill of lading which recites that goods have been received, when no goods have in fact been delivered to him, the statement as to the receipt of the goods amounts to a representation by the carrier of a fact which was, or, in the ordinary course of business, ought to have been within his knowledge, and that as to an innocent and *bona fide* holder of the bill of lading, the carrier will be estopped from claiming that he did not receive the goods. A leading case taking this view is that of Armour *v.* The Railroad,[39] decided by the court of appeals of New York. In that case, the party having produced to the agent of the railroad forged warehouse receipts

38. Friedlander *v.* Railway Co., 130 U. S. 416; Pollard *v.* Vinton, 105 U. S. 7; Iron Mountain R'y *v.* Knight, 122 U. S. 79; Williams *v.* Railroad, 93 N. C. 42; Freeman *v.* Buckingham, 18 How. 182; The Lady Franklin, 8 Wall. 325; National Bank of Commerce *v.* Railway Co., 44 Minn. 224, 46 N. W. Rep. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263; Swedish American Natl. Bank *v.* Railway Co., — Minn. —, 105 N. W. Rep. 69; The Asphodel, 53 Fed. 835; American, etc., Co. *v.* Maddock, 93 Fed. 980, 36 C. C. A. 42; The Isola Di Procida, 124 Fed. 942; Bank *v.* Lavelle, 52 Mo. 380. But see, Smith *v.* Railway Co., 74 Mo. App. 48; Roy & Roy *v.* Railway Co., — Wash. —, 85 Pac. Rep. 53; Henderson *v.* Railroad Co., 116 La. —, 41 So. Rep. 252.

Bills of lading are not by the commercial law negotiable in the same sense as bills of exchange and promissory notes. They are merely the evidence of ownership, general or special, of the property mentioned in them and of the right to receive the property at the place of delivery, and one making advances of money on them does so at his own risk and with notice of the limitation as to the power or right of the master or agent to sign the same. Lazard *v.* Merchants' & Miners' Transportation Co., 78 Md. 1, 26 Atl. Rep. 897.

39. 65 N. Y. 111.

for certain goods, and having thereby obtained from the agent receipts or bills of lading for them, making the pretended freight deliverable to the plaintiff as consignee, and having thereupon drawn upon the plaintiff attaching the railroad receipts to his draft which the plaintiff paid, it was held that the railroad was bound to make good to the plaintiff, the defrauded party, his loss. The case was said, however, to differ from the cases referred to, in the fact that by the railroad receipts or bills of lading, the goods were made deliverable directly to the plaintiff, and that no assignment to him by the party practicing the fraud had been necessary or had been resorted to. The receipts were therefore equivalent to direct representations to the plaintiff that the goods had been delivered to the road on his account, which it was estopped from denying. The case might have admitted of an argument, said the court, had the plaintiff been compelled to derive his title through the indorsement of another who, it was conceded, had none. In later cases, however, this distinction is deemed to be of no importance, and the carrier is held liable to the assignee.[40]

Sec. 163. (§ 125.) Recitals as to condition of goods, how far conclusive.—It has likewise been determined that the usual

40. Batavia Bank *v.* Railroad Co., 106 N. Y. 195. Following the New York rule are Brooke *v.* Railroad Co., 108 Pa. St. 529; Sioux City Railroad Co. *v.* Bank, 10 Neb. 556; Savings Bank *v.* The Railroad, 20 Kan. 519; Railway Co. *v.* Adams, 4 Kan. App. 305, 45 Pac. Rep. 920; Railroad Co. *v.* Larned, 103 Ill. 293; Dean *v.* Driggs, 137 N. Y. 274, 33 N. E. Rep. 326, 33 Am. St. Rep. 721.

In Mississippi it is provided by statute that the acknowledgment of the receipt of the goods by the carrier will be conclusive if the bill of lading reaches the hands of a *bona fide* holder. See The Guiding Star, 62 Fed. Rep. 407, 10 C. C. A. 454, 22 U. S. App. 344.

But if a person surreptitiously procures bills of lading from the carrier for goods not shipped, and forwards the bills of lading with drafts attached to the consignee who pays the amount of the drafts, the carrier will not be liable to such consignee where the person who has thus procured the bills of lading later ships goods of like amount and kind to those called for by the previous bills of lading, and the consignee accepts such goods in substitution. Railroad Co. *v.* Milmine, 57 Ill. App. 291.

recital in such instruments that the goods are in good order has reference only to the external appearance, either of the goods themselves or of the packages into which they are put. Hence, it is always competent for the carrier to show, notwithstanding such an admission, that the loss or damage was caused by the spoiling of the goods from natural decay before they could be delivered, or that they had wasted from defects in the vessels in which they were contained, or that it arose from the unskilful or improper manner in which they were packed, or that they had deteriorated or were damaged at the time they were delivered to him.[41] He is not presumed to know the quality of the goods, nor can he refuse to carry them, whatever it may be, if they are fit to carry and are of the kind he usually carries, nor can he, ordinarily, know the condition of the contents of the packages or vessels brought to him for transportation. It cannot be supposed, therefore, that he intends by such a recital to admit more than that the goods are in an apparently fit condition for shipment. And such is the construction which these words have received. If the damage has proceeded from any such hidden cause, whether naturally inherent in the

41. Nelson *v.* Woodruff, 1 Black, 156; Clark *v.* Barnwell, 12 How. 272; Hastings *v.* Pepper, 11 Pick. 41; Bradstreet *v.* Heran, 2 Blatch. 116; Keith *v.* Amende, 1 Bush, 455; Richards *v.* Doe, 100 Mass. 524; The Olbers, 3 Ben. 148; The Oriflamme, 1 Sawyer, 176; Arend *v.* The Liverpool, etc., Co., 64 Barb. 118; Hazard *v.* Railroad Co., 67 Miss. 32, 7 So. Rep. 280; Missouri, etc., R'y Co. *v.* Fennell, 79 Tex. 448, 15 S. W. Rep. 693; Railway Co. *v.* Holder, 10 Tex. Civ. App. 223, 30 S. W. Rep. 383; Bath *v.* Railway Co. (Tex. Civ. App.), 78 S. W. Rep. 993, citing Hutchinson on Carr.; Roth *v.* Packet Co., 12 N. Y. Supp. 460; Jean Garrison & Co. *v.* Flagg, 90 N. Y. Supp. 289, 45 Misc. 421; Whitman *v.* Vanderbilt, 75 Fed. 422, 21 C. C. A. 422, 38 U. S. App. 693; Argo S. S. Co. *v.* Seago, 101 Fed. 999, 42 C. C. A. 128; Mears *v.* Railroad Co., 75 Conn. 171, 52 Atl. Rep. 610, 96 Am. St. Rep. 192, 56 L. R. A. 884; Railway Co. *v.* Neel, 56 Ark. 279, 19 S. W. Rep. 963, citing Hutchinson on Carr.; Foley *v.* Railroad Co., 96 N. Y. Supp. 182.

The same rule applies to the recitals made in way-bills and the various reports made along the road. Missouri, etc., R'y Co. *v.* Ivy, 79 Tex. 444, 15 S. W. Rep. 692.

A fortiori is there no warranty of quality where the bill of lading states that the contents of the package are unknown. Iron Mt. R'y Co. *v.* Knight, 122 U. S. 79.

commodity itself or arising from the carelessness of the shipper, the loss must be borne by him. The carrier is not then in fault, nor is his acknowledgment that they have been received in good order or condition a warranty or insurance against such an event. But if it can be shown that the loss might have been avoided by the use of the proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, he will still be liable.[42]

Sec. 164. Effect of recitals as to amount or quantity of goods received.—While, ordinarily, recitals in bills of lading as to the amount or quantity of goods received are not conclusive between the parties, and the carrier is not estopped from showing that the amount or quantity stated was never in fact delivered to him for transportation, yet he may, by express language to that effect, agree that he will be bound to a delivery of the quantity specified, or that the bill of lading shall furnish the only evidence of the quantity received, and when he has so bound himself, he will be liable for any shortage in delivery, although such shortage may have resulted from his never having received the amount or quantity specified.[43] It is sometimes provided in bills of lading that any deficiency in the cargo on arrival at destination shall be paid for by the carrier and deducted from the freight charges, and that any excess shall be paid for to the carrier by the consignee. In such cases it is held that the words, "deficiency in cargo," refer to the amount or quantity to be delivered by the carrier at destination, and that, the obligations being mutual and incurred for the purpose of avoiding disputes over the amount actually received by the carrier, he is thereby estopped from disputing the correctness of his acknowledgment and is bound to account for any deficiency in the cargo.[44] The same

42. Clark *v.* Barnwell, *supra.*

43. Sawyer *v.* Cleveland Iron Min. Co., 69 Fed. 211, 16 C. C. A. 191, 35 U. S. App. 427; Steamship Co. *v.* Mackay (1903), 1 K. B. Div. 297, 72 L. J. K. B. 147; The Tongoy, 55 Fed. 329.

44. Rhodes *v.* Newhall, 126 N. Y. 74, 27 N. E. Rep. 947, 22 Am. St. Rep. 859, *affirming s. c.* 12 N. Y. Supp. 669.

rule will apply with equal force to a case where the consignor and consignee are the same person and the deficiency has not been brought about by any mistake or bad faith on his part.[45]

Sec. 165. (§ 125a.) Same subject—Effect of clauses in receipt that weight, contents, or value of goods are unknown.—While it is undoubtedly competent for the carrier by an express representation to bind himself as to the actual weight, contents or value of the goods purporting to have been received by him, yet he may exclude any such construction by words limiting his undertaking, as by inserting a provision that the weight, contents or value of the goods are unknown to him. Thus, receipts in bills of lading qualified by the statement "weight unknown," "weight and contents unknown," "number unknown," are common and are given effect.[46] When such language is used, the carrier will not be responsible for the stated amount, number, weight or kind where he is ready to

45. Sawyer *v.* Cleveland Iron Min. Co., *supra.*

46. The Ismeale, 14 Fed. Rep. 491; 22 *id.* 559; Matthiessen *v.* Gusi, 29 Fed. Rep. 794; Jessel *v.* Bath, L. R. 2 Exch. 267; Lebeau *v.* Navigation Co., L. R. 8 C. P. 88; The Peter der Grosse, L. R. 1 Prob. Div. 414; The Asphodel, 53 Fed. Rep. 835; American Sugar Refining Co. *v.* Maddock, 93 Fed. Rep. 980, 36 C. C. A. 42; The Seefahrer, 133 Fed. Rep. 793; The La Kroma, 138 Fed. Rep. 936.

The words, "contents and value unknown," used on a general blank form for shipping all kinds of freight, apply only to packages therein mentioned the contents of which are concealed from view. They cannot, therefore, apply to corn in bulk loaded into a car from an elevator. Tibbits & Son *v.* The Railroad, 49 Ill. App. 567.

The words "weight and quantity unknown" used in a bill of lading are open to explanation in regard to the exact amount of goods delivered to the ship. Planters' Fertilizer Mfg. Co. *v.* Elder, 101 Fed. 1001, 42 C. C. A. 130.

So far as a provision in the bill of lading, "weight is subject to correction," is concerned, a reasonable interpretation must be given to it such as both parties would naturally give when the shipment was made. Errors and mistakes are liable to occur in weighing all commodities, and the right to correct such errors may be reserved in the contract of shipment. If the shippers have either actual or constructive notice of the provision, anything attributable to ordinary differences in weighing, such as might reasonably be expected to occur, may be corrected. But the right must be kept within the reasonable limits of such errors. The carrier, therefore, would have no right, under cover of the

deliver the quantity or kind of goods actually received.[47] Thus in the case of Miller *v.* The Railroad Company,[48] it appeared that fifty-five barrels purporting to contain eggs but actually containing nothing but sawdust had been delivered to the carrier in Kansas City for transportation to New York. The receipts in their printed form acknowledged that "the following described packages, in apparent good order (contents and value unknown)," had been received for transportation, and the property was described in writing as "30 bbls. eggs" and "25 bbls. eggs," respectively. Drafts were drawn which were paid by the plaintiffs in good faith relying upon the bills of lading, and they brought their action against the receipting carrier. The court below held the carrier liable, deeming the case to be one of first impression, and that the cases[49] theretofore arising did not embrace a case where no goods whatever of the kind recited had been delivered. The written description was held to prevail over the printed words of limitation, "contents and value unknown."[50] This decision, however, was reversed by the court of appeal.[51]

"The sole question," said Andrews, C. J., "is whether the description in the bill of lading was a representation by the carrier that the barrels contained eggs, because, if this is the true construction of the instrument, the right of the plaintiff to recover is unquestionable.[52] But we are of opinion

provision, to account for such a difference as would arise only from the gross negligence of the agent. Tibbits & Son, *v.* The Railroad, *supra.*

47. Under the clause, "weight unknown," the statement, "three hundred tons" in the bill of lading was held to be not even *prima facie* evidence as to the weight against the ship when it appeared that all of the commodity received was delivered. Henderson *v.* Iron Ore, 38 Fed. Rep. 36.

48. 24 Hun, 607; 90 N. Y. 430.

49. Citing Jessel *v.* Bath, L. R. 2 Exch. 267; *In re* The Columbo, 3 Blatch. 521; Shepherd *v.* Naylor, 5 Gray, 591; West *v.* Steamboat Berlin, 3 Iowa, 532; Clark *v.* Barnwell, 12 How. (U. S.) 272; Barrett *v* Rogers, 7 Mass. 299; Grant *v.* Norway, 10 C. B. 665; Meyer *v.* Peck, 28 N. Y. 598; Sears *v.* Wingate, 3 Allen, 103; Byrne *v.* Weeks, 7 Bosw. 372.

50. Citing Leeds *v.* Mechanics' Ins. Co., 8 N. Y. 351; Harper *v.* Albany Ins. Co., 17 N. Y. 198.

51. 90 N. Y. 430.

52. Citing Meyer *v.* Peck, 28 N. Y. 598.

that this construction is inadmissible. Taking the whole instrument together, it imports only that the defendant had received thirty packages described as containing or purporting to contain eggs, but the actual contents of which were to the defendant unknown. The opposite view proceeds upon the theory that there is an irreconcilable repugnancy between the written and printed parts of the instrument, or that the words 'contents unknown' relate simply to the kind of eggs in the packages. It is no doubt a principle of construction that in case of repugnancy between written and printed clauses of an instrument, the written clauses will prevail over the printed.[53] But this is a rule which is only resorted to from necessity, when the printed and written clauses cannot be reconciled, and in that respect is like the rule applied in the construction of wills where two clauses are repugnant and irreconcilable, in which case the first will be rejected and the subsequent clause will be regarded as indicating the final intention, in the absence of any other clue to the interpretation.[54] But it is the imperative duty of courts to give effect if possible to all the terms of an agreement. The construction is to be made upon a consideration of the whole instrument, and not upon one or more clauses detached from the others; and this principle applies as well to instruments partly printed and partly written as to those wholly printed or wholly written.[55] Where two clauses, apparently repugnant, may be reconciled by any reasonable construction, as by regarding one as a qualification of the other, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent provisions. Applying these settled rules to the instrument in question, it is, we think, reasonably clear that the defendant did not make any representation as to the contents of the packages. Its agent simply certified, in effect, that they were described as containing eggs, accompanying this with the state-

53. Citing Harper *v.* Insurance Co., 17 N. Y. 194.

54. Citing Van Nostrand *v.* Moore, 52 N. Y. 12.

55. Citing Barhydt *v.* Ellis, 45 N. Y. 107.

ment that the contents were not in fact known. The plaintiffs in making the advances were chargeable with knowledge of the contents of the bill of lading, and must be deemed to have relied upon the assurance of the shipper as to the contents of the packages. The claim that the word 'contents unknown' referred simply to the kind of eggs is manifestly untenable.

"The question involved in this case has been substantially adjudicated. In Haddow *v.* Parry[56] the bill of lading acknowledged, 'as shipped in good order, six boxes containing $12,000, being marked and numbered as in the margin,' etc. In the margin were copied the marks of the several chests, their number and contents, describing them as containing $12,000 each. The words 'contents unknown' were inserted before the signature of the master. Lord Mansfield said: 'If the master qualifies his acknowledgment by the words *contents unknown*, he acknowledges nothing.' In Shepherd *v.* Naylor,[57] the weight in tons, hundreds and pounds of iron shipped was mentioned in the body of the bill, but the words 'weight unknown to' were added before the master's signature, and the court held that the carriers were not concluded by the statement of weight, Shaw, C. J., saying: 'The words *weight unknown* are significant. It is said, however, that they are repugnant, and therefore to be rejected. But that is not the necessary construction; they may be used to modify and control the admission of weight.' In Jessel *v.* Bath,[58] the plaintiff was assignee for value of a bill of lading for goods shipped on defendant's vessel. The bill acknowledged 'as shipped in good order, etc., thirty-four thousand four hundred and sixty kilogrammes mineral in bulk, being marked and numbered as per margin, and to be delivered,' etc., and printed before the signature were the words 'weight, contents and value unknown.' The vessel delivered seven tons twelve hundred weight less than the amount stated in the bill, and the suit was for the non-delivery of the residue. The case was decided on the construction of an English statute; but Kelley, C. B., said: 'The

56. 3 Taunt. 303.
57. 5 Gray, 591.
58. L. R. 2 Exch. 267.

written part of the bill is not entirely inconsistent with the printed. The whole may be reasonably and fairly read as meaning that a quantity of manganese had been received on board appearing to amount to thirty-three tons, but that the person signing the bill would not be liable for any deficiency, inasmuch as he had not in fact ascertained and therefore did not know the true weight.[59]

"The question in this case, relating as it does to the construction of a commercial instrument in general use, is of considerable practical importance. It seems to us that the decision below does not give due weight to the rule which requires the construction of a contract to be made upon a consideration of all its parts and that if possible no clause shall be rejected. The volume and methods of the business of transportation by railroads and transportation lines render it practically impossible in most cases for the carrier to ascertain by examination the contents of packages received for carriage, and when he qualifies his receipt, as in this case, we know of no reason why parties dealing upon bills of lading so qualified shall not be held to notice of the qualification."

Sec. 166. (§ 125b.) Same subject— So in Cox *v.* Bruce,[60] Lord Esher said: "It is said that, because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right—that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in Grant *v.* Norway.[61] It is clearly impossible, consistently with that decision, to assert that the mere fact of a statement being made in the bill of lading estops the ship-owner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the ship-owner. The ground of that de-

59. Citing, also, Vaughn *v.* Casks of Wine, 7 Ben. 506; Clark *v.* Barnwell, 12 How. 282; The Columbo, 3 Blatchf. 521.

60. L. R. 18 Q. B. Div. 147.

61. 10 C. B. 665.

cision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed. Therefore the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading, so as to bind his owners, the particular mercantile quality of the goods before they are put on board; as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do."

This rule was applied in an interesting case[62] in the supreme court of the United States. It appeared that one P. was engaged in buying and shipping to Texarkana, Arkansas, from different points in the south, large quantities of cotton. There, under P.'s direction, it was put into a compress house controlled by the carrier and compressed for shipment. P. superintended the weighing, classing and marking of it and selected for shipment the particular bales to be set forward by the carrier to fill orders for it. The carrier was in the habit of issuing bills of lading for this cotton, often in advance of the separation of the particular bales described. Such a bill of lading, reciting the receipt of a large number of bales described as "contents unknown," "marked and numbered as per margin," was sent forward with draft attached, and the draft was paid by the consignee before the receipt of the cotton. When the cotton arrived it did not cor-

62. Iron Mt. R'y Co. *v.* Knight, 122 U. S. 78.

respond with the marks and quality indicated on the bill of lading, and the consignee refused to accept it, sold it on account of the carrier, and brought his action to recover the difference. The court held that the bill of lading did not bind the carrier as by a warranty of quality and that the consignee could not recover.

Sec. 167. Terms of bill of lading cannot be varied by parol. —But bills of lading, except as to the recital or acknowledgment of the receipt of the goods and of their quality and condition when received, are strictly written contracts between the parties and come within the general rule which prohibits the introduction of parol evidence to contradict or vary such contracts.[63] If, therefore, no fraud or mistake enter into their execution, they will be taken as the sole evidence of the final agreement between the parties, and parol evidence of all prior negotiations respecting the terms upon which the goods were received will be inadmissible.[64] Where, however, a bill of lading is ambiguous, the ambiguity may be removed by the aid of parol evidence.[65]

63. Clark *v.* Barnwell, 12 How. 272; Ellis *v.* Willard, 5 Seld. 529; The Delaware, 14 Wall. 579; Snow *v.* Railway Co., 109 Ind. 422; Indianapolis R. R. *v.* Remmy, 13 Ind. 518; Hall *v.* Pennsylvania Co., 90 Ind. 459; Bartlett *v.* Railway Co., 94 Ind. 281; Hostetter *v.* Railroad Co. (Penn.), 11 Atl. Rep. 609; The Caledonia, 43 Fed. Rep. 681; Hewett *v.* Railway Co., 63 Iowa, 611; Louisville, etc., R'y Co. *v.* Fulgham, 91 Ala. 555, 8 So. Rep. 803; Railway Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. Rep. 480; Railway Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. Rep. 298, citing Hutchinson on Carr.; Railroad Co. *v.* Richardson, 19 Ky. Law Rep. 1495, 43 S. W. Rep. 465; Davis *v.* Railroad Co., 66 Vt. 290, 29 Atl. Rep. 313, 44 Am. St. Rep. 852; Kellerman *v.* Railroad Co., 136 Mo. 177, 34 S. W. Rep. 41; Sonia Cotton Oil Co. *v.* The Red River, 106 La. 42, 30 So. Rep. 303, 87 Am. St. Rep. 293, citing Hutchinson on Carr.; Portland Flouring Mills Co. *v.* Insurance Co., 130 Fed. 860, 65 C. C. A. 344, *affirming* 124 Fed. 855.

64. St. Louis, etc., R. Co. *v.* Cleary, 77 Mo. 634; Long *v.* Railroad Co., 50 N. Y. 76; Belger *v.* Dinsmore, 51 N. Y. 166; Collender *v.* Dinsmore, 55 N. Y. 200; Hinckley *v.* Railroad Co., 56 N. Y. 429; Turner *v.* Railroad Co., 20 Mo. App. 632.

In the absence of fraud or mistake, it must be conclusively presumed that the oral negotiations respecting the terms and conditions upon which the goods were received, and the route by which they are to be forwarded, are merged in the bill of lading. This must be taken as the final repository and sole evidence of the agreement between the parties. Snow *v.* Railway Co., 109 Ind.

Sec. 168. Same subject—Implied obligations cannot be varied by parol.—And not only is such evidence inadmissible to change or vary in any particular the express terms of the contract, but in these instruments, as in all other written contracts, there may be implied obligations as to which the contract may be entirely silent but which result by legal implication or by construction from the very nature of the contract itself; and such implied obligations can no more be varied by verbal evidence than the express written stipulations of the parties. Thus, if goods are delivered to a carrier for transportation to a point beyond his terminus, and there is more than one route by which such point is reached, but the bill of lading is silent as to which shall be employed, he is impliedly authorized to select any usual or reasonably direct and safe route by which to forward them, and parol evidence cannot be resorted to for the purpose of showing that another was intended.[66] So, also, if the bill of lading is silent as to the time within which the goods are to be delivered, the law will presume that a reasonable time was contemplated and parol evidence will be inadmissible to negative the presumption thus created.[67]

422. See, also, Railroad Co. *v.* Shomo, 90 Ga. 496, 16 S. E. Rep. 220, citing Hutchinson on Carr.; Bedell *v.* Railroad Co., 94 Ga. 22, 20 S. E. Rep. 262; McEwen *v.* Railway Co., 109 Ga. 249, 34 S. E. Rep. 281, 77 Am. St. Rep. 371, citing Hutchinson on Carr.; Holten *v.* Railroad Co., 61 Mo. App. 204; Tallahassee Falls Mfg. Co. *v.* Railway Co., 117 Ala. 520, 23 So. Rep. 139, 67 Am. St. Rep. 179; Burgher *v.* Railroad Co., 105 Iowa 335, 75 N. W. Rep. 192; Helm *v.* Railroad Co., 98 Mo. App. 419, 72 S. W. Rep. 148.

65. The Wanderer, 29 Fed. Rep. 260.

66. Snow *v.* Railway Co., 109 Ind. 422, citing White *v.* Ashton, 51 N. Y. 280; Hinckley *v.* Railroad, 56 N. Y. 429; Simkins *v.* Steamboat Co., 11 Cush. 102; Hudson Canal Co. *v.* Coal Co., 8 Wall. 276.

The bill of lading, being silent in respect to the line by which the goods are to be forwarded, its effect is the same as if a provision was therein inserted that the carrier should have the right to select at his discretion any customary or usual route which was regarded as safe and reasonable. This provision, being thus imported into the contract by law, is as unassailable by parol as any of the express terms of the contract. Snow *v.* Railway Co., *supra*. See also, Express Co. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. Rep. 412.

67. Railway Co. *v.* Baugh (Tex. Civ. App.), 42 S. W. Rep. 245; Railroad Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. Rep. 838, 44 Am. St. Rep. 37.

Sec. 169. Same subject.—Where an attempt was made to show a parol contract made before the shipment of the goods or the signing of the bill of lading, that the goods might be stowed on deck, from which they had been lost by being jettisoned in a storm, it was said that "unless the bill of lading contains a special stipulation to that effect, the master is not authorized to stow the goods sent on board as cargo on deck, as when he signs the bill of lading, if in common form, he contracts to convey the merchandise safely in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck; and when the master departs from that rule and stows them on deck, he cannot exempt either himself or the vessel from liability in case of loss by virtue of the exception of the dangers of the seas, unless the dangers were such as would have occasioned the loss even if the goods had been stowed as required by the contract of affreightment. Contracts of the master within the scope of his authority as such bind the vessel; and the master is responsible for the safe stowage of the cargo under deck, and if he fails to fulfill that duty he is responsible for the safety of the goods; and if they are sacrificed for the common safety, the goods stowed under deck do not contribute to the loss. Ship-owners in a contract by bill of lading for the transportation of merchandise take upon themselves the responsibilities of common carriers, and the master as the agent of such owners is bound to have the cargo safely secured under deck unless he is authorized to carry the goods on deck by the usage of the particular trade or by the consent of the shipper; and if he would rely upon the latter, he must take care to require that the consent shall be expressed in a form to be available as evidence under the general rules of law."[1] And even where it appeared that the shipper or his agent who delivered the goods to the carrier repeatedly saw them as they were being stowed in that way and made no objection, it was

1. The Delaware, 14 Wall. 579; Creery *v.* Holly, 14 Wend. 28; The Waldo, Daveis, 162; Blacket *v.* Exchange Co., 2 Cromp. & J. 250; Arnould on Ins. 776; Lenox *v.* The Ins. Co., 3 Johns. Cas. 178; Shackleford *v.* Wilcox, 9 La. 33; Barber *v.* Brace, 3 Conn. 14.

held that the evidence was not admissible to vary the legal import of the contract of shipment, and that the bill of lading being a clean bill, that is, being silent upon the subject, bound the owners of the vessel to carry the goods under deck.[2]

Sec 170. Same subject—Effect of subsequent parol agreement.—But while the rule as we have seen is, that neither the express terms nor the implied rights and obligations of the contract embodied in the bill of lading can be contradicted or varied by oral evidence of prior parol negotiations, it does not follow that a parol agreement subsequently entered into and to which the parties have mutually assented will not be binding on them, although it operates to change or modify the terms of the bill of lading.[3] In such a case, it is said, the rule that written contracts not falling within the statute of frauds may be changed or modified by a subsequent parol agreement which is founded upon a sufficient consideration will apply, and parol evidence will be admissible to prove its terms, although such evidence tends to change or modify the provisions of the written contract.[4] Thus, while the carrier has the right in a case where there are two routes over which he may forward goods, and the bill of lading is silent as to the route to be employed, to select the usual and customary route, such right is not inalienable and may be modified by a subsequent parol agreement to forward the goods over a particular route.[5]

Sec. 171. Effect of delivery of bill of lading after oral contract of shipment made but before shipment has begun.—If the shipper and the carrier have entered into an oral contract for the shipment of goods, but before such contract is acted upon the shipper accepts from the carrier, with knowledge of its contents, a bill of lading which contains provisions at variance with the conditions of the oral contract, the ordinary rule that a bill of lading is the sole evidence of the final agreement of the parties

2. Sproat *v.* Donnell, 26 Maine, 187.

3. Steidl *v.* Railroad Co., — Minn. —, 102 N. W. Rep. 701; Railway Co. *v.* Craycraft, 12 Ind. App. 203, 39 N. E. Rep. 523; Railroad Co. *v.* Levy, 127 Ind. 168, 26 N. E. Rep. 773.

4. Steidl *v.* Railroad Co., *supra.*

5. Steidl *v.* Railroad Co., *supra.*

will apply, and the bill of lading will be held to control the shipment.[6] It has been held, however, by the Court of Civil Appeals of Texas that a bill of lading thus delivered, although signed by the shipper, will not control the shipment when no affirmative evidence appears that, at the time he made the verbal contract, he knew he would be required to sign the written contract or that he knew the contents of such written contract.[7]

Sec. 172. Same subject—How when goods shipped under parol contract before bill of lading delivered.—But if the carrier has, in pursuance of an oral contract, already shipped the goods, the mere acceptance and retention by the shippers of a bill of lading the conditions of which are unlike those of the oral contract will not preclude him from showing what the actual agreement was under which the goods were shipped; and the oral contract alone will be looked to in determining the contract rights and duties of the parties.[8] But the rule as thus stated must not

6. Railway Co. *v.* Batte (Tex. Civ. App.), 94 S. W. Rep. 345.

7. Gulf, etc., R'y Co. *v.* Funk, — Tex. Civ. App. —, 92 S. W. Rep. 1032.

8. Bostwick *v.* The Railroad, 45 N. Y. 712; Wilde *v.* Transportation Co., 47 Iowa, 247; Stoner *v.* Railway Co., 109 Iowa, 551, 80 N. W. Rep. 569; Hendrick *v.* Railroad Co., 170 Mass. 44, 48 N. E. Rep. 835; Rudell *v.* Transit Co., 117 Mich. 568, 76 N. W. Rep. 380, 44 L. R. A. 415; Transportation Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. Rep. 624, 41 Am. St. Rep. 265; Railway Co. *v.* Elgin, etc., Co., 175 Ill. 557, 51 N. E. Rep. 911, 67 Am. St. Rep. 238; Railway Co. *v.* Hull, 76 Ill. App. 408; Waldron *v.* Fargo, 170 N. Y. 130, 62 N. E. Rep. 1077, *reversing* 64 N. Y. Supp. 798; Burns *v.* Burns, 131 Fed. 238, 65 C. C. A. 224; Railway Co. *v.* Wood (Tex. Civ. App.), 30 S. W. Rep. 715; Railway Co. *v.* Botts, 22 Tex. Civ. App. 609, 55 S. W. Rep. 514; Railway Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. Rep. 286, citing Hutchinson on Carr.; Railway Co. *v.* Wright, 20 Tex. Civ. App. 137, 49 S. W. Rep. 147; McCullough *v.* Railway Co., 34 Mo. App. 23; Transportation Co. *v.* McKenzie (Can.), 25 S. C. R. 38; Olds *v.* Railroad Co., 94 N. Y. Supp. 924.

The leading case on this subject is Bostwick *v.* The Railroad, 45 N. Y. 712. It was there held that where the goods had already been shipped under a verbal agreement, the delivery afterwards to the shipper of a bill of lading, his attention not being called to its terms or conditions, did not conclude him from showing what the actual agreement was under which the shipment had been made. The verbal contract was, as proven, to transport by rail; but in the bill of lading there were printed conditions which authorized the car-

be understood as denying to the parties, after the goods have been accepted for transportation, the right to alter or modify the conditions of the oral contract by a bill of lading subsequently delivered. If, therefore, the shipper, when accepting the bill of lading, has his attention called to its terms, or if he otherwise has notice of its conditions and he either expressly or impliedly assents to them, there is no reason why the bill of lading should not control the shipment, although its terms are inconsistent with the oral contract.[9] But to have this effect, the assent of the shipper to the terms expressed in the bill of lading must have been fairly procured, and if it should appear that an unfair advantage was taken of him, or any means or devices resorted to to keep him from fully understanding its terms, the carrier would not be permitted to avail himself of them.[10] If, however, at the time the

riage by rail and water. The carrier at the terminus of his own line forwarded a portion of the goods by water, and the vessel having been wrecked and the goods lost he was held liable under the verbal agreement. And it was said in the same case to have been previously determined by the court that the conditions contained in a bill of lading not delivered until after the shipment and the loss of the goods, though before the loss was known, did not control the rights of the shipper.

This case was followed in Swift *v.* Steamship Co., 106 N. Y. 206. There oil had been shipped from Panama to New York under a special contract, partly in parol and partly in writing. Afterwards the carriers sent to the shippers bills of lading containing limitations not agreed upon. "The defendants," said the court, "could not abrogate or alter that contract by merely signing and mailing bills of lading which did not reach the plaintiffs until after the oil had left Aspinwall, and much, if not all, the loss had occurred. There certainly was no conclusive evidence that the plaintiffs consented to accept the bills of lading in place of the prior contract, and that contract must, therefore, control." Bostwick *v.* The Railroad, *supra;* Guillaume *v.* Transportation Co., 100 N. Y. 491, and Wheeler *v.* Railroad Co., 115 U. S. 29 were cited.

Where a passenger ticket containing a limitation as to baggage was not delivered until long after fare had been paid and the baggage received, it was held to be a question for the jury whether there was a valid contract. Lunansky *v.* Packet Co., 99 N. Y. Supp. 810.

9. The Arctic Bird, 109 Fed. 167; The Railway Co. *v.* American, etc., Co., 195 U. S. 439, *affirming* Farmer's, etc., Co. *v.* Railroad Co., 120 Fed. 873, 57 C. C. A. 553, *which case reverses* 112 Fed. 829.

10. A written contract presented by the carrier's agent to the

bill of lading is issued, damages have accrued under the oral contract, the shipper will not, by accepting the bill of lading and assenting to its terms, waive his right to sue for the breach. But if the bill of lading should expressly provide that any breach of the oral agreement relating to the shipment should be waived, and the shipper assents to such condition, thereby evincing an intention to regard the writing as covering the entire shipment, his assent will amount to a disclaimer of the breach and a waiver of his right to claim damages therefor.[11]

Sec. 173. Same subject—Effect of custom—Temporary receipts.—If a custom has become well established between the shipper and carrier for the latter to issue his receipts after the goods have been shipped, and a receipt is issued by the carrier in accordance with such custom for goods after they have been shipped, its terms will control the rights of the parties.[12] So if the shipper has notice from a previous course of dealing that, in order to secure a reduced freight rate, he must agree to certain conditions in the carrier's bill of lading, and he delivers goods to the carrier to be transported at such reduced rate, a mere delay by the carrier in executing the bill of lading until the service has been partly performed will not operate to relieve the shipper from the effect of such conditions.[13] And if at the time the goods are accepted by the carrier for transportation a temporary receipt is issued, and it is mutually contemplated by the parties

shipper after the goods have been delivered, which the shipper is induced to sign by a misrepresentation, will not bind him to its terms. Railway Co. *v.* Anderson, 26 Tex. Civ. App. 518, 63 S. W. Rep. 1023. Where, in order to secure a right given him under an oral contract, the shipper is obliged to sign a new contract while the goods are in transit, and he does so under protest, he will not be concluded by the terms of the second contract. Railroad Co. *v.* Lannum, 71 Ill. App. 84.

11. Hoover *v.* The Railroad, — Mo. App. —, 88 S. W. Rep. 769.

Where a special written contract limiting the carrier's liability was not signed by the shipper until after the property had been injured, it was held that the shipper was not bound by it where it was understood that it would not be prejudicial to his claim. Frasier *v.* The Railway Co., — S. Car. —, 52 S. E. Rep. 964.

12. Shelton *v.* The Mer. D. T. Co., 59 N. Y. 258.

13. Railway Co. *v.* Patterson, 69 Ill. App. 438.

that a bill of lading shall later be substituted for the receipt, the latter will be considered as representing the first and only contract between the parties.[14] But the mere acceptance by the shipper of a receipt which provides that the goods are received subject to the terms of a bill of lading to be subsequently issued will not operate to bind him to such terms, and unless his assent to them has been fairly secured, the carrier cannot avail himself of them.[15] The receipt in such a case is not considered as representing the contract of shipment, and any conditions inserted in it are therefore regarded as mere notices, not binding on the shipper unless he has assented to them. It was held, however, in the case of Dunbar *v.* The Railway Company,[16] that where the receipt delivered to the shipper expressly stated that the goods were received subject to the terms and conditions of the company's bill of lading, for while it was provided the receipt should be exchanged, the shipper would be deemed to have had such notice as to put him on inquiry and would be bound by the terms and conditions of the bill of lading.

Sec. 174. Same subject—Acceptance of bill of lading after oral agreement made to furnish cars at certain time.—If the shipper enters into an oral agreement with the carrier to furnish cars at a certain time, and before that time arrives a written contract is executed which provides that the goods are not to be transported within any specified time nor delivered at destina-

14. Washburn Crosby Co. *v.* Railroad Co., 180 Mass. 252, 62 N. E. Rep. 590.

15. Merchant's, etc., Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. Rep. 624, 41 Am. St. Rep. 265.

Where a mere receipt is delivered to the shipper which recites that the goods are received subject to the company's bill of lading, no bill of lading ever being issued, the bill of lading does not thereby become a part of the shipping contract. Pittsburgh, etc., Ry. Co. *v.* Bryant, — Ind. App. —, 75 N. E. Rep. 829. A provision in a shipping receipt that goods are to be shipped "as per conditions in company's bill of lading," will not render binding on the shipper conditions written into the bill of lading not assented to or authorized by him. Railway Co. *v.* Potts & Co., 33 Ind. App. 564, 71 N. E. Rep. 685. See also, Stewart *v.* The Railway, 21 Ind. App. 218, 52 N. E. Rep. 89.

16. 62 S. Car. 414, 40 S. E. Rep. 884.

tion at any particular hour, the carrier will not be liable in damages if he fails to furnish the cars at the time stated in the oral agreement. The oral agreement in such a case is merged in the written contract and the latter will furnish the only evidence of the rights of the parties.[17] But after a breach by the carrier of the oral agreement, the fact that the shipper sends his goods forward in cars subsequently furnished and takes a bill of lading covering the shipment will not preclude him from the right to recover damages unless he has expressly agreed upon a sufficient consideration to waive such right.[18]

Sec. 175. (§ 129.) Bills of lading are assignable, but not negotiable.—In commercial transactions bills of lading are regarded as the representatives of the goods, and when properly indorsed and delivered, with the intention of passing the title to them, it is a symbolic or constructive delivery of the goods themselves. And while a delivery without indorsement cannot operate as a transfer of the legal title to the goods, it will have the effect of giving to the transferee an equitable title in and to the goods represented by the bill of lading, although, in the absence of statute, it will afford him no right to maintain an action thereon in his own name.[19] Bills of lading are not, however, negotiable

17. Helm *v.* Railroad, 98 Mo. App. 419, 72 S. W. Rep. 148.

18. McAbsher *v.* Railroad, 108 N. Car. 344, 12 S. E. Rep. 892; Hamilton *v.* Railroad, 96 N. Car. 398; Railway *v.* Racer, 10 Ind. App. 503, 37 N. E. Rep. 280; Gulf, etc., R'y Co. *v.* House & Watkins (Tex. Civ. App.), 88 S. W. Rep. 1110.

Where the carrier's agent orally agrees with a shipper of live stock to furnish cars on a certain day, a written contract which is subsequently issued in which the authority of the agent to agree to furnish cars on such day is limited will not merge the oral contract. Railway Co. *v.* Combes & Rector (Tex. Civ. App.), 80 S. W. Rep. 1045.

19. Turner *v.* Israel, 64 Ark. 244. See also, First Nat'l Bank *v.* Dearborn, 115 Mass. 219; Railroad Co. *v.* Wilkens, 44 Md. 11; Nathan *v.* Giles, 5 Taunt. 558; Merchants' Bank *v.* Railroad Co., 69 N. Y. 373; First Nat'l Bank *v.* Railroad Co., 85 Hun, 160, 32 N. Y. Supp. 604; Railroad Co. *v.* Irwin, 46 Ind. 180; Railroad Co. *v.* Phillips, 60 Ill. 190; Dodge *v.* Meyer, 61 Cal. 405; Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. Rep. 858, 54 Am. St. Rep. 672; American, etc., Co. *v.* Markle, 102 Mo. App. 158, 76 S. W. Rep. 668.

But the holder may show that it was not his intention to transfer the title to the goods. Railroad Co. *v.* Mt. Vernon Co., 84 Ala. 173,

in a strictly mercantile sense like bills of exchange, but are said to be *quasi* negotiable.[20] They are assignable, and possess one additional quality which is not possessed by contracts generally which are merely assignable. They stand as a substitute for the goods they represent, and when properly indorsed and delivered, with the intention of passing their title, it is equivalent to an actual delivery of the goods themselves,[21] though the assignee gets

4 So. Rep. 356; Railroad Co. *v.* Barkhouse, 100 Ala. 543, 13 So. Rep. 534; Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. Rep. 44.

20. Stollenwerck *v.* Thatcher, 115 Mass. 224; Am. Notes to Lickbarrow *v.* Mason, 1 Smith's Ld. Cas. 896.

The characteristics of the bill of lading are well described by Chief Justice Fuller in Friedlander *v.* Railway Co., 130 U. S. 416, as follows: "Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen, though to a *bona fide* purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position, ostensibly, as to estop him from asserting his right as against a purchaser who has been misled to his hurt by reason of such negligence. Shaw *v.* Railroad Co., 101 U. S. 557; Pollard *v.* Vinton, 105 U. S. 7, 8; Gurney *v.* Behrend, 3 El. & Bl. 622, 633, 634. It is true that, while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery."

21. *United States:* The Carlos F. Ross, 177 U. S. 655, 44 L. Ed. 929.

California: Dodge *v.* Meyer, 61 Cal. 405.

Georgia: Railroad Co. *v.* Lowe, 101 Ga. 320, 28 S. E. Rep. 867.

Illinois: Michigan Cent. R. R. Co. *v.* Phillips, 60 Ill. 198; Burton *v.* Curyea, 40 Ill. 320.

Iowa: Ayres, etc., Co. *v.* Produce Co., 101 Iowa, 141, 70 N. W. Rep. 111, 63 Am. St. Rep. 376.

Kentucky: Railroad Co. *v.* Hartwell, 99 Ky. 436, 36 S. W. Rep. 183, citing Hutchinson on Carr.; Bank

no greater or other rights than the assignor had.[22] And this restricted common law negotiability which attaches to them may be further qualified by the insertion of appropriate terms which will wholly destroy all negotiability. They will still, however, be assignable and, when thus dealt with, the assignee will take a valid title to the goods, subject, of course, to all the equities be-

v. Cotton Oil Co., 26 Ky. Law Rep. 518, 82 S. W. Rep. 253.

Maine: McKee *v.* Garcelon, 60 Me. 167; Robinson *v.* Stewart, 68 Me. 61.

Massachusetts: Stone *v.* Swift, 4 Pick. 389.

Maryland: Nat'l Bank of Bristol *v.* Railroad Co., 99 Md. 661, 59 Atl. Rep. 134, 105 Am. St. Rep. 321.

Minnesota: Ryan *v.* Railway Co., 90 Minn. 12, 95 N. W. Rep. 758; Ratzer *v.* Railway Co., 64 Minn. 245, 66 N. W. Rep. 988, 58 Am. St. Rep. 530.

Missouri: Midland, etc., Bank *v.* Railway Co., 62 Mo. App. 531; Dickson *v.* Elevator Co., 44 Mo. App. 498.

Nebraska: Railway Co. *v.* Johnston, 45 Neb. 57, 63 N. W. Rep. 144, 50 Am. St. Rep. 540, citing Hutchinson on Carr.

New York: Hazard *v.* Fiske, 83 N. Y. 287.

Oregon: Wadhams & Co. *v.* Balfour, 32 Or. 313, 51 Pac. Rep. 642.

Texas: Campbell *v.* Alford, 57 Tex. 159.

Vermont: Davis *v.* Bradley, 28 Vt. 118; Tilden *v.* Minor, 45 Vt. 196; Joslyn *v.* Railway Co., 51 Vt. 92.

"Bills of lading, by the law merchant, are representatives of the property for which they have been given; and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee; is a complete legal delivery of the goods; divests the vendor's lien." Benjamin on Sales, § 813.

"While the goods are afloat, it is common knowledge, and I should not think of citing authorities to prove it, that the bill of lading represents them, and the indorsement and delivery of the bill of lading, while the ship is at sea, operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do." Per Erle, C. J., in Meyerstein *v.* Barber, L. R. 2 C. P. 42.

A purchaser who has reason to believe that his vendor is not the owner of the bill, or that it was given to secure an outstanding draft, is not a *bona fide* holder (Shaw *v.* Railroad Co., 101 U. S. 557); nor a purchaser on consideration of an antecedent indebtedness. Skilling *v.* Bollman, 73 Mo. 665; Loeb *v.* Peters, 63 Ala. 243; Harris *v.* Pratt, 17 N. Y. 249; O'Brien *v.* Norris, 16 Md. 122; Naylor *v.* Dennie, 8 Pick. 199. *Contra*, in Maryland, by statute. Tiedeman *v.* Knox, 53 Md. 612.

22. J. C. Hass & Co. *v.* Bank, —— Ala. ——, 39 So. Rep. 129, 1 L. R. A. (N. S.) 242; Haas *v.* Railroad Co., 81 Ga. 792; Tison *v.* Howard, 57 Ga. 410; Shaw *v.* Railroad Co., 101 U. S. 557; Grayson County Nat'l Bank *v.* Railway Co.

tween the original parties.[23] But if their indorsement and delivery have been procured by fraud or mistake, they pass no title as against the true owner, even to the *bona fide* holder. Unless, therefore, the real owner has parted with his bill of lading voluntarily and with the intention of parting at the same time with his title to the goods, even the innocent holder of it, although he may have acquired it for a valuable consideration, can claim no rights under it, and the presumption of ownership arising from its possession will be open to explanation or rebuttal by other evidence tending to disclose the identity of the true owner. A delivery of the goods to such *bona fide* holder would, therefore, be a delivery to the wrong person,[24] and the carrier would be liable to the real owner for their value, no matter how innocently or how excusably he may have acted in making the delivery.[25]

(Tex. Civ. App).), 79 S. W. Rep. 1094; Alabama Nat'l Bank *v.* Railway Co., 42 Mo. App. 284; Anchor Mill Co. *v.* Railroad Co., 102 Iowa 262, 71 N. W. Rep. 255.

23. Nat'l Bank of Bristol *v.* Railroad Co., 99 Md. 661, 59 Atl. Rep. 134, 105 Am. St. Rep. 321; Merchants', etc., Bank *v.* Steamboat Co., —— Md. ——, 63 Atl. Rep. 108.

24. "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bona fide* transferee for valuable consideration without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred wthout his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented." Per Lord Campbell, in Gurney *v.* Behrend, 3 El. & Bl. 633. See, also, Shaw *v.* Railroad Co., 101 U. S. 557.

But if the assignment and transfer of the bill of lading has been procured from the owner of the goods by fraud, the *bona fide* holder by purchase from the fraudulent vendee will acquire an indefeasible title to the goods (Dows *v.* Greene, 24 N. Y. 638), upon the well-settled principle that a sale consummated by delivery cannot be set aside on the ground of fraud, after the goods have been resold to a *bona fide* purchaser. See, also, Nat'l Bank of Bristol *v.* Railroad Co., 99 Md. 661, 59 Atl. Rep. 134, 105 Am. St. Rep. 321.

25. Brower *v.* Peabody, 3 Kernan, 121; Decan *v.* Shipper, 11 Casey, 239; Dows *v.* Perrin, 16 N. Y. 325; Gurney *v.* Behrend, 3 Ellis & B. 622; Dows *v.* Greene, 24 N. Y. 638.

Sec. 176. (§ 129a.) Same subject—Statutes making them negotiable.—It has been attempted in some states to confer upon bills of lading the quality of negotiability by statute. Statutes of this nature, however, operating to make innovations upon the common law, will not be construed as making any changes which the words used do not import. Thus in a case[26] before the supreme court of the United States, such statutes in Missouri and Pennsylvania were involved. The statute in Pennsylvania declared that bills of lading should "be negotiable, and may be transferred by indorsement and delivery;" while that of Missouri enacted that "they shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes." These statutes were held to be substantially alike, both prescribing the manner of negotiation, *i. e.*, by indorsement and delivery, and neither undertaking to define the effect of such a transfer.

"Bills of lading," said the court, "are regarded as so much cotton, corn, iron or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement." It was held,

26. Shaw *v.* Railroad Co., 101 U. S. 557.

therefore, that the rule which protects a *bona fide* purchaser of a bill or note, though it has been lost by or stolen from the true owner,[27] did not apply to protect one who had purchased a bill of lading from a thief who had stolen it from the true owner. And in another case,[28] before the supreme court of Iowa, the court, in construing the Missouri statute above quoted, said: "What is meant by this, as we understand it, is to give to such document negotiability and assignability by indorsement and delivery, so that the indorsee may sue thereon in his own name. It does not necessarily follow that because a statute has made bills of lading negotiable, all the consequences of an indorsement and delivery of bills and notes before maturity ensue, or are intended to result from such negotiation. Bills of lading represent property, and, when indorsed or assigned, operate as a symbolic delivery to the indorsee or assignee of the property covered thereby. Such a transfer is quite different from the negotiation of a bill of exchange or promissory note which circulates in the commercial world as an evidence of money." It was, therefore, decided that where the consignor of goods had transferred to a bank a bill of lading with draft attached which he had drawn upon the consignee for the price of the goods, and the bank had given him credit therefor, the rule of commercial paper that a mere discount and credit does not, of itself, amount to a *bona fide* purchase for value, did not apply, and that the bank, by such an assignment, secured a better title to the goods than an attaching creditor of the consignor who had attached the goods while in transit. Where, however, a state court had held that the law does not regard bills of lading "as negotiable

27. As applied in Goodman *v.* Harvey, 4 Ad. & E. 870; Goodman *v.* Simonds, 20 How. 343; Murray *v.* Lardner, 2 Wall. 110; Matthews *v.* Poythress, 4 Ga. 287; Miller *v.* Race, 1 Burr, 452; Peacock *v.* Rhodes, 2 Doug. 633; Phelan *v.* Moss, 67 Pa. St. 59, cited by the court. See, also, Munroe *v.* Warehouse Co., 75 Fed. 545.

The words, "non negotiable," stamped on the face of a bill of lading executed in Missouri, do not destroy its assignability. The sole effect of such words is to exempt it from the provisions of the Missouri statute. Midland Nat'l Bank *v.* Railway, 62 Mo. App. 531.

28. First Nat'l Bank *v.* Mt. Pleasant Milling Co., 103 Iowa, 518, 72 N. W. Rep. 689.

in the same sense in which a bill of exchange and promissory note is," and the legislature immediately afterwards declared that they shall be negotiable instruments and securities "in the same sense as bills of exchange and promissory notes," and in explicit terms provided that the effect of their negotiation or transfer shall be to vest the title to the property mentioned in them in every successive *bona fide* holder for value wholly unaffected by any rights or equities between the original or any other prior holder of which he had not actual notice at the time he received them, the rule in the cases quoted from cannot apply.[29]

Sec. 177. (§ 130.) Goods must be delivered only in accordance with bill of lading and its indorsements.—The carrier takes the risk of a delivery to the person entitled to the goods by the bill of lading and its indorsements.[30] The consignee named

29. Tiedeman *v.* Knox, 53 Md. 612. Where a statute in terms makes bills of lading executed in the state, or being executed elsewhere for the delivery of goods within the state, negotiable instruments, and conclusive in the hands of *bona fide* holders of actual delivery to the carrier, *held*, to apply only to goods, the final destination of which was a point within the state, and not to goods delivered by one carrier to another in transit through the state. Lazard *v.* Merchants & Miners' Transportation Co., 78 Md. 1, 26 Atl. Rep. 897.

30. McEntee *v.* The Steamboat Co., 45 N. Y. 34; Hawkins *v.* Hoffman, 6 Hill, 586; Devereux *v.* Barclay, 2 B. & Ald. 702; Guillaume *v.* The Packet Co., 42 N. Y. 212; Duff *v.* Budd, 3 B. & Bing. 177; Railway Co. *v.* Johnston, 45 Neb. 57, 63 N. W. Rep. 144, 50 Am. St. Rep. 540; Clegg *v.* Railway Co., 135 N. Car. 148, 47 S. E. Rep. 667, 65 L. R. A. 717; Ratzer *v.* Railway Co., 64 Minn. 245, 66 N. W. Rep. 988, 58 Am. St. Rep. 530; The Sangerties, 44 Fed. 625; Ullman *v.* Railway Co., 93 N. Y. Supp. 480; Grayson, etc. Bank *v.* Railway Co., (Tex. Civ. App.) 79 S. W. Rep. 1094.

Where bill of lading recites that goods are to be carried "to Louisville depot only," the carrier is liable if he delivers to an unauthorized person. Merchants' Disp. *v.* Merriam, 111 Ind. 5.

"We have found an expression in the opinions of some of the courts to the effect that, if a delivery be made in the absence of the bill of lading, the carrier takes the risk; but we apprehend that it is merely meant that he takes the risk of the bill being such as authorizes a delivery to the person to whom he may deliver." Nashville, etc. Ry Co. *v.* Grayson Co. Nat'l Bank, —— Tex. ——, 93 S. W. Rep. 431, *reversing*,— Tex. Civ. App. ——, 91 S. W. Rep. 1106.

in the bill of lading is presumptively the owner of the goods and must be treated by the carrier as the absolute owner until he has had notice to the contrary; and a delivery to him without such notice will discharge the carrier.[31] Thus, if the consignor would for any reason retain the ownership or control of the goods, he must notify the carrier of such fact; for otherwise the presumption that the consignee named is the rightful owner and entitled to their possession will prevail as against any undisclosed intention which the consignor may have had to the contrary.[32] But if the party who claims the goods is not the consignee, he should be required to produce the bill of lading with the indorsement of the consignee where the goods are deliverable to him or to his assigns, or of the shipper himself when the goods are shipped on his account and are deliverable to his order. And where goods are shipped deliverable to the order of the consignor for and on account of the consignee, the carrier should not deliver to such consignee, except upon the production of the bill of lading properly indorsed by the consignor; for this is notice to the carrier

31. O'Dougherty *v.* The Railroad, 1 Thomp. & C. 477; Sweet *v.* Barney, 23 N. Y. 335; Lawrence *v.* Minturn, 17 How. 100; Railway Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. Rep. 480; Hartwell v. Railroad Co., 15 Ky. Law Rep. 778, citing Hutchinson on Carr.; Schlesinger *v.* Railroad Co., 88 Ill. App. 273; Orange County Fruit Exchange *v.* Hubbell, 10 N. Mex. 47, 61 Pac. Rep. 121; Sonia Cotton Oil Co. *v.* The Red River, 106 La. 42, 30 So. Rep. 303, 87 Am. St. Rep. 293, citing Hutchinson on Carr.; Nebraska Meal Mills v. Railway Co., 64 Ark 169, 41 S. W. Rep. 810, 62 Am. St. Rep. 183, 38 L. R. A. 358, citing Hutchinson on Carr.; Weisman *v.* Railroad Co., 22 R. I. 128, 47 Atl. Rep. 318.

If the shipper gives express instructions to the carrier's agent not to deliver the goods to the consignee named without the bill of lading being produced, a violation of such notice by the carrier will make him liable to the shipper for any loss thereby sustained. Faggan *v.* Railway Co., 61 Hun. 623, 16 N. Y. Supp. 25.

Where no bill of lading is issued, the carrier will be justified in making delivery to the consignee without the production of receipts or other evidence of ownership issued to the consignor. In such a case the carrier will be justified in assuming that title to the goods passed to the consignee when it received them for transportation. Schlichting *v.* Railway Co., 121 Iowa 502, 96 N. W. Rep. 959.

32. Nebraska Meal Mills *v.* Railway Co., 64 Ark. 169, 41 S. W. Rep. 810, 62 Am. St. Rep. 183, 38 L. R. A. 358.

that the shipper intends to retain in his power the ultimate disposition of the goods.[33] So if another than the consignee claims the goods and presents the bill of lading without a proper indorsement, the carrier should refuse delivery unless such person is in fact the rightful holder, and the carrier will be allowed a reasonable time to ascertain if such is the case. And if goods are shipped over several connecting lines of road, and the initial carrier has issued a bill of lading to cover the shipment, it will be the duty of the carrier undertaking final delivery to ascertain the consignee and deliver only to him or to his order. Thus if a preceding carrier, by mistake or otherwise, directs the final carrier to deliver the goods to another than the one entitled to them under the bill of lading, and delivery is made in accordance with such direction, the final carrier will not be permitted to avail himself of the preceding carrier's mistake as an excuse for delivering the goods to the wrong person.[34] Too great caution cannot, therefore, be exercised in respect to the right of the person to

33. The fact of making the bill of lading deliverable to the order of the shipper is, when not rebutted by evidence to the contrary, decisive to show his intention to reserve the *jus disponendi* and to prevent the property from passing to the vendee. See the learned chapter of Mr. Benjamin (ch. 6, Bk. 2), in his work on Sales, upon this subject of the reservation of the *jus disponendi* by the shipper in the bill of lading, where the leading cases upon the subject are stated. See, also, to the same effect: Pennsylvania R. R. Co. *v.* Stern, 119 Pa. St. 24; North Penn. R. R. Co. *v.* Commercial Bank, 123 U. S. 727; Watson *v.* Hoosac Tunnel Line, 13 Mo. App. 263; Libby *v.* Ingalls, 124 Mass. 503; Furman *v.* Railroad Co., 106 N. Y. 579; Joslyn *v.* Grand Trunk R'y, 51 Vt. 92; Peoria Bank *v.* Railroad Co., 58 N. H. 203; Thompson *v.* Railroad Co., 122 Ala. 378, 24 So. Rep. 931, citing Hutchinson on Carr.; The Adella S. Hills, 47 Fed. 76; Gregg *v.* Railroad Co., 147 Ill. 550, 35 N. E. Rep. 343, 37 Am. St. Rep. 238; Railroad Co. *v.* Hartwell, 99 Ky. 436, 36 S. W. Rep. 183, citing Hutchinson on Carr.; Ryan *v.* Railway Co., 90 Minn. 12, 95 N. W. Rep. 758; Midland Nat'l Bank *v.* Railway Co., 132 Mo. 492, 33 S. W. Rep. 521, 53 Am. St. Rep. 505; Union Stock Yards Co. *v.* Westcott, 47 Neb. 419, 66 N. W. 419; Railway Co. *v.* Lau, 57 Neb. 559, 78 N. W. Rep. 291; McSwegen *v.* Railroad Co., 40 N. Y. Supp. 51, 7 App. Div. 301; Stone *v.* Railway Co., 8 S. Dak. 1, 65 N. W. Rep. 29.

34. Foy *v.* Railway Co., 63 Minn. 255, 65 N. W. Rep. 627. See, also, Sellers *v.* Railway Co., 123 Ga. 386, 51 S. E. Rep. 398.

whom the delivery is made.[35] No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow in fact of no excuse for a wrong delivery except the fault of the shipper himself; and where there is any doubt, and it can be determined by documentary evidence, its production should be required. Instances of great hardship to the carrier frequently occur from neglecting these precautions.

Sec. 178. Same subject—If person claiming goods fails to present proper bill of lading, carrier must base refusal to deliver on that ground.—If the person demanding the goods of the carrier fails to present a proper bill of lading, the carrier may refuse delivery to him. But if such person is in fact entitled to possession of the goods, the carrier, to avail himself of the excuse that a proper bill of lading was not presented, must assert it when demand is made and base his refusal to deliver on that ground. And if he fails to do so and refuses delivery upon some other ground which later proves erroneous, he will be estopped from alleging as a defense to an action against him for the refusal that the person demanding the goods failed to present a proper bill of lading.[36]

Sec. 179. (§ 130a.) Same subject—Carrier must respect transfers.—In the absence of other directions, goods are deliverable to the consignee. But bills of lading are transferrable to third persons in the ordinary course of business, and the carrier must recognize such transfers. It is also a matter of every-day practice to make consignments to factors and agents. Unless pro-

35. In Nashville, etc., Ry Co. *v.* Grayson Co. Nat'l Bank, —— Tex. ——, 93 S. W. Rep. 431, *reversing* (Tex. Civ. App.) 91 S. W. 1106, the blanks in the body of the bill of lading, which were left for the name of the place of destination and for that of the consignee, had not been filled. The court held that the omission was immaterial, the name of the consignee and the place of delivery clearly appearing elsewhere upon the face of the paper, and that the railway company, being under obligation to deliver to such consignee, was discharged from further liability by such delivery.

36. Railroad Co. *v.* Seitz, 214 Ill. 350, 105 Am. St. Rep. 108, 73 N. E. Rep. 585, *affirming*, *S. C.* 105 Ill. App. 89; Clegg *v.* Railroad Co., 135 N. Car. 148, 47 S. E. Rep. 667, 65 L. R. A. 717.

tected by proper vouchers a carrier cannot assume to deal with consignments as in all cases actually and beneficially belonging to the consignee.[37]

Sec. 180. (§ 130b.) Same subject—Carrier's duty to ascertain if bill of lading issued.—The carrier, being thus bound to deliver the goods in accordance with the bill of lading, is, it is said, under obligation to ascertain whether or not a bill of lading was delivered to the shipper, and, if delivered, he must retain the property until it is demanded by one claiming under that title.[38]

Sec. 181. Same subject—Where bill of lading not presented, carrier protected if delivery is made to proper party.—But while the carrier takes the risk of making delivery to the person entitled to the goods by the bill of lading and its indorsements, and should, therefore, be careful to require the person demanding the goods, when such person is another than the consignee, to produce the bill of lading properly indorsed, he will fully discharge his duty in making a delivery without requiring the bill of lading to be presented if delivery is made to the person who is lawfully entitled to the goods. The right of the carrier to demand the presentation of the bill of lading is a precaution of which he may avail himself for the purpose of avoiding delivery to the wrong person, but which, if he sees fit, he may dispense with; and if delivery is made to the person vested with the right to receive the goods, the carrier will have performed his duty. If, therefore, the consignee should direct the carrier to make delivery to a third person to whom he has transferred title, and delivery is made in accordance with such directions without requiring the bill of lading to be produced, the failure of the carrier to require its production will place him under no responsibility to a *bona fide* holder who, after such delivery, has taken the bill of lading from the consignee.[39] And although a bill of lading providing

37. Walker *v.* Railroad Co., 49 Mich. 446; Colgate *v.* Pennsylvania Co., 102 N. Y. 120.

38. City Bank *v.* Railroad Co., 44 N. Y. 136; Furman *v.* Railroad Co., 106 N. Y. 579; Isham *v.* Erie R. Co., 98 N. Y. Supp. 609.

39. Anchor Mill Co. *v.* Railroad Co., 102 Iowa 262, 71 N. W. Rep. 255. See, also, Nashville, etc., Ry.

for a delivery to the consignor or his order contains an express provision that the carrier shall require its surrender or production before making a delivery of the goods, such requirement, it is said, will be considered as having been inserted for the benefit of the carrier, and, *as between himself and the consignor*, cannot subject the carrier to liability for failing to require the production of the bill of lading on making delivery to one to whom the consignor has ordered that the goods shall be delivered.[40]

Sec. 182. Same subject—Effect of transfer of bill of lading after delivery of goods.—Since the bill of lading is *quasi* negotiable only, and represents the property only while in course of transportation, it follows that, if the carrier, without requiring

Co. *v.* Grayson County Nat'l Bank, —— Tex. ——, 93 S. W. Rep. 431, reversing (Tex. Civ. App.) 91 S. W. Rep. 1106.

40. Chicago Packing & Provision Co. *v.* Railway Co., 103 Ga. 140, 29 S. E. Rep. 698, 40 L. R. A. 367, 10 Am. & Eng. R. Cas. (N. S.) 391. The court, in its opinion, said: "If a natural person consigned goods to his own order under a bill of lading which provided that it should be surrendered before a delivery could be made, and called in person upon the carrier's agent at the point of destination, and demanded a delivery of the goods, and thereupon received the same, it certainly could not be questioned as between him and the carrier, that such delivery would be good, and would free the carrier from further liability to him, although the bill of lading may not have been produced and surrendered in accordance with the stipulations therein contained. While in such a case the carrier might not, as against one who had in good faith and in due course of business obtained the bill of lading properly indorsed, be protected by a delivery to the original consignor, surely the latter would have no cause of complaint against the carrier. If such consignor could thus obtain a delivery of the goods to himself in person, what difference in principle would it make if, instead of doing this, he, by a written order directed delivery to another who obtained the goods upon such order without producing and surrendering the bill of lading. In either case, looking at the transaction with reference only to the consignor and the carrier, the latter would have done all that the former had any right to require of it."

Where a shipper of goods consigns them to his agent and the carrier delivers them in accordance with the agent's directions to a third person to whom the agent has sold them, the carrier will not be liable to the shipper for their value because delivery is made without compelling the production of the bill of lading. Gates *v.* Railroad Co., 42 Neb. 379, 60 N. W. Rep. 583.

the surrender or cancellation of the bill of lading, makes a delivery of the goods to the person entitled to their possession, the bill of lading will cease to be of value and cannot thereafter, by being transferred, even to a *bona fide* transferee, vest the transferee with title to the goods nor give him any rights as against the carrier for failing to require its surrender or cancellation at the time of making delivery.[1] But where the bill of lading expressly provides that the carrier shall require its surrender before making a delivery, the carrier must heed such provision, and, for a failure to do so, whereby an innocent person dealing with the goods sustains injury, he will be liable.[2] It is held, however, by some courts that, although the bill of lading contains no such provision that the carrier shall require its surrender on delivery of the goods, it is, nevertheless, negotiable to the extent of conferring upon an innocent transferee for value rights superior to those possessed by the transferor, and that, as to such a holder who has taken it in the regular course of business without notice that a delivery has been made, the carrier will be liable for having made delivery without requiring its production or cancellation.[3] The reasons advanced in support of this rule are declared to rest on commercial necessity. It has become a well-established custom, as we shall see, in the transactions of commerce and commercial credit, for bills of lading to be taken, on the faith of their representing the goods, as security for money advanced. The effect of this custom, it is said, is to make them to some extent and for some purposes negotiable, and to give superior rights to innocent transferees for value who take in the usual course of business. The carrier must, therefore, to protect

1. See, Anchor Mill Co. *v.* Railroad Co., 102 Iowa, 262, 71 N. W. Rep. 255; National, etc., Bank *v.* Transportation Co., 69 N. Y. Supp. 396, 59 App. Div. 270; *affirmed* 172 N. Y. 596, 64 N. E. Rep. 1123.

2. Merchant's, etc., Bank *v.* Steamboat Co., —— Md. ——, 63 Atl. Rep. 108; Chesapeake, etc., Steamboat Co. *v.* Merchant's, etc., Bank, —— Md. ——, 63 Atl. 113; Midland Nat'l Bank *v.* Railway Co., 132 Mo. 492, 33 S. W. Rep. 521, 33 Am. St. Rep. 505.

3. Ratzer *v.* Railway Co., 64 Minn. 245, 66 N. W. Rep. 988, 58 Am. St. Rep. 530; Midland Nat'l Bank *v.* Railway Co., *supra;* Railway Co. *v.* Johnston, 45 Neb. 57, 63 N. W. Rep. 144, 50 Am. St. Rep. 540.

himself under this rule against a possible transfer of the bill of lading after a delivery of the goods, require its production and cancellation; and if he fails to do so, he will be held responsible to an innocent transferee for value on the principle that where one of two innocent persons must suffer by reason of the fraud of a third party, he, by whose negligent act or omission such third party was enabled to commit the fraud, ought to bear the loss.

Sec. 183. Same subject—Bill of lading to shipper's order—Draft attached.—For the purpose of obtaining payment for the goods before delivery to the person for whom they are intended, it is frequently the custom for the shipper, on delivering his goods to the carrier, to take a bill of lading calling for a delivery to his own order and, after attaching a draft drawn upon the person for whom the goods are intended, to forward the same to a bank at the point of delivery where the drawee, on payment of the draft, may secure the bill of lading. When such a course is taken the carrier will be liable to the consignor if loss ensue through a delivery of the goods to the drawee before he has paid the draft and obtained possession of the bill of lading from the bank.[4] But if the consignor, after receiving information that the carrier has made delivery of the goods without requiring the production of the bill of lading and with knowledge that payment of the draft has not been made, proceeds to draw another draft on the same party, payable a certain number of days after date, and takes in acceptance thereof, he will be deemed to have abandoned the original purpose of requiring payment on delivery and to have ratified the delivery as made.[5] In such a case the carrier will be relieved from further liability to the consignor, although, on maturity of the second draft, payment is not made. So, too, if the carrier, before the drawee has paid the draft and secured the bill of lading, makes delivery without requiring the production of the bill of lading, the carrier will thereby incur no liability if the drawee later pays the draft; and the subsequent insolvency of the bank, before the amount collected has been

4. See cases cited in following section.

5. Railway Co. *v.* Kinchen, 103 Ga. 186, 29 S. E. Rep. 816.

remitted to the consignor, cannot operate to make the carrier liable to him for the loss.[6]

Sec. 184. Same subject—Pledge of bill of lading to shipper's order to secure advances—Draft attached.—The practice is also common in commercial circles for the shipper of goods to take from the carrier a bill of lading providing for a delivery to his own order, and pledge it as collateral security for money advanced upon the faith of its representing the goods. The usual custom in such a case is for the shipper to draw a draft upon the person for whom the goods are intended, attach it to the bill of lading, and secure a discount of the draft by indorsing the bill of lading to a bank. The bank thus becomes the lawful holder of the bill of lading as pledgee and may retain the same in its possession until payment of the draft is made; and if the carrier makes delivery of the goods to the drawee of the draft before he has obtained possession of the bill of lading from the bank, such delivery will be wrongful and the carrier will be liable to the bank as for a conversion.[7] The title, however, acquired by the bank is not absolute and may be terminated by the payment of the draft. Where, therefore, the drawee pays the draft, he will at once become entitled to possession of the goods, and the fact that he may have failed to obtain the bill of lading from the bank cannot subject the carrier to liability for making delivery to him without calling for its production. In an illustrative case in which the carrier was held liable for making delivery before payment of the draft had been made and possession of the bill of lading secured, the facts were as follows: The purchaser of cotton at Savannah delivered it there to a vessel to be carried to

6. Witt *v.* Railroad Co., 99 Tenn. 442, 41 S. W. Rep. 1064.

7. A written undertaking which the carrier issues in exchange for the bill of lading by which it agrees to make delivery only on presentation of such undertaking will serve the same purpose as the bill of lading and when pledged as security for the payment of a draft which a bank has discounted on the faith of the undertaking, the carrier will be liable if delivery is made to a purchaser of the goods before he has obtained possession of it from the bank. National, etc., Banking Co. *v.* Railroad Co., 70 N. J. Law 774, 58 Atl. Rep. 311, 103 Am. St. Rep. 825, 66 L. R. A. 595. See, also, cases cited in note 9.

New York, taking from it bills of lading in which the vessel undertook to deliver it there to his order. For the purpose of obtaining money to pay for the cotton, the purchaser made his draft upon his firm in New York on whose account the cotton had been bought, and attached the bills of lading to it. The draft with the bills of lading attached was discounted by a Georgia bank, and the bills of lading were indorsed to the order of the bank's agent in New York to secure the payment of the draft. The draft and bills of lading were at once forwarded to the New York agent, who procured the acceptance of the former by the firm. Before the draft became due the vessel arrived at New York and gave notice to the firm there of the arrival of the cotton. It had before regularly brought cotton in the same way to the firm, which was considered solvent, and the master knowing that they were the parties for whom the cotton was intended, and having no information or knowledge from the bank's agent or from any other source of any other consignee or claimant, delivered the cotton to them, taking their receipt for it. Some two weeks or more afterwards, the draft falling due and not being paid, the cotton was demanded of the owners of the vessel by the bank's agent. It was claimed that the delivery thus made was justifiable under the circumstances and that the vessel had thereby discharged its obligation; but it was held that though it had been made in good faith and in total ignorance of any outstanding claim to the cotton, the delivery was nevertheless in breach of the contract of affreightment, and that the agent of the bank as libelant could subject the vessel which was bound for its proper delivery at all events. "It is no excuse," say the court, "for a delivery to the wrong person that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee at least was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown or is absent or cannot be found after diligent search. And if, after inquiry, the consignee or indorsees of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods

until they are claimed, or store them prudently for and on account of the owner. He may thus relieve himself from a carrier's responsibility. He has no right under any circumstances to deliver to a stranger."[8] This decision has been followed in many cases.[9]

Sec. 185. Same subject—Pledge of bill of lading to shipper's order—Time draft attached.—If the draft attached to the bill of lading which has been indorsed to a bank as collateral security for an advance of money be a time draft, the very nature of such a transaction, it is said, suggests that the consignor contemplated an executory contract of sale, to become complete on an acceptance of the draft by the drawee. Unless, therefore, it is expressly stipulated that the bill of lading is intended to secure payment of the draft, it is held that the title of the bank as pledgee will become extinguished on the acceptance of the draft by the drawee, and that the drawee will at once become entitled to the goods. And if, after an acceptance of such a draft by the drawee, the bank should continue to hold the bill of lading pending payment of the draft, the carrier will nevertheless be justified in making delivery to the drawee, and cannot thereafter, because of the drawee's failure to pay the draft at maturity, be subjected to liability for having made delivery without requiring the drawee to produce the bill of lading.[10]

8. The Thames, 14 Wall. 98.

9. Pennsylvania R. Co. *v.* Stern, 119 Penn. St. 24; North Penn. R. Co. *v.* Commercial Bank, 123 U. S. 727; Boatmen's Bank *v.* Railroad Co., 81 Ga. 221; Bass *v.* Glover, 63 Ga. 745; Furman *v.* Railroad Co., 106 N. Y. 579; Joslyn *v.* Grand Trunk R'y, 51 Vt. 92; Libby *v.* Ingalls, 124 Mass. 503; Holmes v. Bailey, 92 Penn. St. 57; Halsey *v.* Warden, 25 Kan. 128; Commercial Bank *v.* Pfeiffer, 22 Hun. 327; Walters *v.* Railroad Co., 66 Fed. 862, 14 C. C. A. 267, 30 U. S. App. 25; The Ravensdale, 75 Fed. 413; *s. c.* 75 Fed. 408; First Natl. Bank *v.* Railroad Co., 85 Hun 160, 32 N. Y. Supp. 604; Grayson, etc. Bank *v.* Railway Co., (Tex. Civ. App.) 79 S. W. Rep. 1094, citing Hutchinson on Carr.; Railroad Co. *v.* Bank, 41 Ill. App. 287; Vaughn *v.* Railroad Co., —— R. I. ——, 61 Atl. Rep. 695; Tishomingo Sav. Inst. *v.* Johnson, Nesbitt & Co., —— Ala. ——, 40 So. Rep. 503.

10. The Commercial Bank of Manitoba *v.* Railway Co., 160 Ill. 401, 43 N. E. Rep. 756; National Bank *v.* Merchant's Bank, 91 U. S. 92.

Sec. 186. (§ 131a.) Same subject—Invoice alone not evidence of title.—So S. & S. shipped goods consigned to themselves. At the same time they wrote a letter to the purchaser stating that they had shipped the goods and drawn on him "as per arrangements" and requested that the draft be protected. Inclosed in the letter was an invoice of the goods which stated on its face that the goods were "shipped from Bay City, Mich., via F. & P. M. R. R. to B. L. with draft." They also drew on the purchaser for the price, attached the bill of lading to the draft, and sent the draft on for collection. The purchaser exhibited the invoice and letter to the agent of the carrier and received the goods. He failed before paying the draft and the carrier was held liable.[11]

"The title to the property," said Paxson, J., "remained in the consignors until delivery in accordance with the conditions. Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsees with a constructive custody which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading and to the persons entitled to receive the same.[12] There could be no delivery except in accordance with the bill of lading.[13] The invoice alone furnishes no proof of title."[14]

Sec. 187. (§ 131b.) Same subject—Direction to notify certain person does not dispense with production of bill of lading.—It is a common practice, where the bill of lading provides for delivery to the consignor's order and has gone forward attached to a draft on the purchaser or other person by whom payment is to be made, to give directions that such person be notified of the arrival of the goods in order that he may pay the draft and

11. Pennsylvania R. Co. *v.* Stern, 119 Pa. St. 24.

12. Citing Hieskell *v.* National Bank, 89 Pa. St. 155.

13. Citing Dows *v.* Milwaukee Bank, 91 U. S. 618; Stollenwerk *v.* Thatcher, 115 Mass. 224.

14. Citing Benj. on Sales, § 332; Dows *v.* Bank, *supra;* See also, Delta Bag Co. *v.* Kearns, 112 Ill. App. 269.

procure the goods. Such a direction to notify, however, does not dispense with the production of the bill of lading as in other cases, and if the carrier delivers the goods to the person so to be notified without requiring him to produce the bill of lading, he will be liable for any loss thereby incurred.[15] The very presence of the word *notify* in such a case, it is said, shows that the person named is not intended as the consignee.[16] And although it has been the custom for the carrier to permit the person to be notified to stop the goods at a point short of their destination and there receive them without producing the bill of lading, such custom, as against a *bona fide* transferee of the bill of lading, will

15. Furman *v.* Railroad Co., 106 N. Y. 579; North Penn. R. Co. *v.* Commercial Bank, 123 U. S. 727; Joslyn *v.* Grand Trunk R'y, 51 Vt. 92; Libby *v.* Ingalls, 124 Mass. 503; National Bank *v.* Railway Co., 25 S. C. 216; Myrick *v.* Railroad Co., 107 U. S. 102; Railroad Co. *v.* Southern Bank, 41 Ill. App. 287; Walters *v.* Railroad Co., 63 Fed. 391, *s. c.* 56 Fed. 369, *affirmed*, 66 Fed. 862, 14 C. C. A. 267; Railroad Co. *v.* Berry, 116 Ga. 19, 42 S. E. Rep. 371, citing Hutchinson on Carr.; Union Stock Yards Co. *v.* Westcott, 47 Neb. 300, 66 N. W. Rep. 419, citing Hutchinson on Carr.; Wright, etc. Co. *v.* Warren, 177 Mass. 283, 58 N. E. Rep. 1082; General Electric Co. *v.* Railway Co., —— S. Car. ——, 51 S. E. Rep. 695; Isham *v.* Erie R. Co., 98 N. Y. Supp. 609.

16. Furman *v.* Railroad Co., *supra;* Atlantic Nat'l. Bank *v.* Railway Co., 106 Fed. 623; Railroad Co. *v.* Lowe, 101 Ga. 320, 28 S. E. Rep. 867, *citing* Hutchinson on Carr.

In Furman *v.* Railroad Co., *supra*, goods had been delivered for transportation, over a long line of steamships and railroads, from Norfolk, Va., to Denver, Col. The goods were marked "Y," and the bill of lading given by the initial carrier recited the receipt of the goods "marked Y—order notify Zucca Bros. to be transported to Denver, Col." The goods finally came into the hands of the defendant, the last carrier in the line. With the goods the defendant received what was known as a "transfer sheet," in which the consignee was named as follows: "Consignee, 'Y,' order Hup, Zucca Bros., Denver, Col.," the word *notify* having, through the carelessness of some previous carrier, been changed to *Hup.* When the goods reached Denver they were delivered to Zucca Bros., upon their order, without the production of the bill of lading. The consignors meantime had drawn on Zucca Bros., attaching the bill of lading indorsed by them, and the draft had gone forward for collection. The goods not being paid for, the consignors brought this action against the defendant to recover their value, and were successful. The court of appeals of New York held that the persons entitled to receive the goods

furnish the carrier with no excuse for making delivery at an intermediate point to the person to be notified without requiring him to produce the bill of lading.[17]

Sec. 188. (§ 131c.) Same subject—Duplicate bills of lading to consignor—Possession of one duplicate not indorsed.—The practice also prevails of taking in the name of the consignor bills of lading in duplicate, one of which is to be indorsed and attached to a draft for the payment of the price, while the other, not indorsed, is sent forward to the person who is to receive and pay for the goods, as notice of their shipment. Such a delivery of the unindorsed duplicate, where the intention is not thereby to part with the title to the goods, does not justify a delivery without the indorsement or order of the consignor. Thus in a case[18] decided by the supreme court of Iowa, it appeared that the Elgin, Iowa, Canning Company had received an order for goods from one Evans, residing in Pueblo, Colorado. Not being acquainted with Evans, and not wishing to sell the goods to him on credit, the company delivered the goods to the first of two connecting carriers, consigned to itself at Pueblo, and took two receipts or bills of lading, which were in fact duplicates, but neither of which showed that the other had been issued. The canning company drew a draft on Evans, through a bank in Pueblo, for the price of the goods and sent the draft to the bank with an order for the delivery of the goods to Evans upon payment of the draft. At the same time the company sent to Evans one of the bills of lading, not signed or indorsed by the canning company, instructing him that the goods had been shipped and that he was to pay the draft and obtain the order. When the goods reached Pueblo, Evans, without paying the draft or obtaining the order, presented the duplicate bill of lading to the final carrier and the goods were delivered to him without any other

were at least so doubtful under the terms of the transfer sheet that it was most negligent in the defendant to deliver the goods without further evidence.

17. Railroad Co. *v.* Ohio Valley Banking & Trust Co., 107 Ga. 512, 33 S. E. Rep. 821.

18. Weyland v. Railway Co., 75 Iowa, 573, 39 N. W. Rep. 899, *reversing the former decision in* 33 N. W. Rep. 133.

authority. At that time Evans was insolvent, but the carrier had no knowledge of that fact, or that the goods had not been paid for, or that a draft had been sent or instructions given as to the delivery of the goods, but it delivered them in good faith. The canning company brought its action against the final carrier for the value of the goods, and it was held entitled to recover. "The fact that Evans presented the bill of lading in this case," said the court, "was not sufficient to overcome the presumption which the terms of the bill raised that the consignee [who was also the consignor] was the owner of the goods. That such is the presumption is well established.[19] The contract with the canning company required the defendant to deliver the goods to the consignor. The unindorsed bill of lading presented by Evans was evidence that the contract was still in force and that the canning company was then the owner of the goods. The delivery to Evans was not authorized, and was made by defendant at its own risk.[20] But it is said that the canning company clothed Evans with the apparent right to demand the goods, and that since 'one of two innocent parties must suffer a loss from the wrong of another, the loss should fall upon the party who put it in the power of that other to perpetrate the wrong.' This case does not fall within that rule, for, as we have seen, the possession of the bill of lading, without indorsement or other evidence of assignment, did not vest Evans with any apparent right to the property. The loss resulted from the negligence of defendant in not insisting upon proper evidence of an assignment before it surrendered the goods."[21]

And where the carrier issues original and duplicate bills of lading made out to the shipper or his order, and such bills of lading provide that delivery shall be made only on presentation of the originals, the carrier will be liable if he makes delivery

19. Citing Congar *v.* Railroad Co., 17 Wis. 485; Krulder *v.* Ellison, 47 N. Y. 37; Lawrence *v.* Minturn, 17 How. 100; Alderman *v.* Railroad Co., 115 Mass. 234.

20. Citing Hutchinson on Carr., 1st Ed., §§ 129, 130, 344.

21. Bank *v.* Transportation Co., 69 N. Y. 374; Lickbarrow *v.* Mason, 1 Smith's Lead. Cas. *838, with annotations; Dows *v.* Greene, 24 N. Y. 638; Allen *v.* Williams, 12 Pick. 297, were cited and distinguished.

to the shipper on his presenting the duplicates where the shipper, prior to receiving the goods, has transferred the originals to another.[22]

Sec. 189. (§ 131d.) Same subject—Possession of indorsed duplicate obtained by fraud.—In a leading and important case[23] in which this method was pursued, it appeared that the consignors had taken to themselves duplicate bills of lading, one of which, unindorsed, they sent forward to the purchaser by way of notice, and the other of which they had indorsed in blank, attached it to a draft on the purchaser and discounted the draft at a bank. When the draft was presented for acceptance the purchaser accepted it, but, at the same time, without detection, and also, as the jury found, without negligence on the part of the bank, substituted the unindorsed duplicate for the indorsed one attached to the draft. Before the fraud was discovered, the purchaser indorsed the latter duplicate to a third person and received from him large advances in money. In an action to determine the rights of the parties, it was held by the supreme court of the United States that the bank's title had not been divested. It was urged that the same rule which protects a *bona fide* purchaser of negotiable paper should govern in the case. But the court, per Strong, J., held otherwise, saying: "The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods

22. Midland Nat'l Bank *v.* Railway Co., 132 Mo. 492, 33 S. W. Rep. 521, 33 Am. St. Rep. 505.

23. Shaw *v.* Railroad Co., 101 U. S. 557.

have such an effect? It may be that the true owner, by his negligence or carelessness, may estop himself from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right."

Sec. 190. (§ 132.) Same subject—Duplicate receipts—Goods deliverable only on production of duplicate.—So, in another case, goods were delivered for carriage to a railroad company with an express provision in its receipt that they should be delivered to the consignee only upon the production of a duplicate of the receipt, and a duplicate of the receipt with this condition indorsed across the face of it was given to the shipper, to be used for the purpose of obtaining the possession of the goods according to this arrangement. After obtaining this duplicate, the shipper drew upon the consignee and attached the duplicate to the draft, which was then discounted by the plaintiff, who forwarded it for collection with the attached duplicate to the residence of the consignee. After accepting the draft, the consignee demanded the goods of the railroad, and they were delivered to him without the production or surrender of the duplicate receipt. When the draft became due and payment was refused, the plaintiff demanded the goods of the railroad, but having previously delivered them to the consignee it refused to deliver or account for them to him; whereupon he brought his action against it and recovered. It was considered by the court that the condition in the receipt was notice to the road that the goods were not to be delivered without a compliance therewith, and that the title to the goods having passed to the plaintiff by the indorsement to him of the receipt, he was partly entitled to sue for the wrong delivery.[24]

Sec. 191. (§ 133.) Same subject—Protection of third person paying draft for consignee's accommodation.—Goods were shipped by railroad for and on account of certain consignees,

24. McEwen *v.* Railroad Co., 33 Ind. 368.

and drafts were drawn on them by the consignor with the railroad receipts attached, and sent for collection to a bank at the place of consignment. The consignees, being unable to meet the drafts on the day they became due, applied to the plaintiff to take them up and take the goods, which he agreed to do. Upon payment of the drafts by him the consignees indorsed to him the railroad receipts. Afterwards the consignees made a bill of sale of the same goods to other parties, who thereby obtained them from the road. Neither these vendees nor the agents of the road knew anything of the previous dealings with the plaintiff, and had no knowledge or information of any claim by him, nor did the plaintiff know of the sale to the other parties until after the road had delivered the goods to them. It was held that the indorsement and delivery of the receipts to the plaintiff gave him a property in the goods, at least to the extent of the advances made by him, and that the consignees after that could convey no title to the goods to another vendee, and that he was therefore entitled to recover from the road.[25]

So N. shipped corn, consigned to his own order, with directions to notify P., who was the purchaser, attaching the bill of lading to a draft on P., which went forward for collection. On arrival P. was absent and draft was protested. P.'s clerk requested J. to pay the draft and hold the bill of lading as security, saying that when P. came he would pay it. Another came on in the same way and J. paid that draft also. The carrier then delivered the corn to P.'s teamsters, who put it in a storehouse, from which they began to draw it to P.'s warehouse. After the corn had been delivered to the teamsters and put in the storehouse, J. learned of it but made no objection to P. or his agents and gave no notice to the carrier. Some days later P. failed, not having paid the drafts, and J. sued the carrier for the amounts. It was held that the carrier was liable, and that J.'s failure to notify the carrier of his claim was no defense, since, while it might have been a neighborly act, he was under no legal obligation to do so, as the delivery was complete before he learned of it.[26]

25. Newcomb *v.* The Railroad, 115 Mass. 230; Alderman *v.* The Railroad, *id.* 223.

26. Joslyn *v.* Grand Trunk R'y., 51 Vt. 92.

Sec. 192. (§ 133a.) Effect of custom on delivery without surrender of bill of lading.—A custom prevailing at the place of delivery, where both the consignee and the holder of a draft with the bill of lading attached reside, to deliver without the production of the bill of lading goods billed "straight," *i. e.*, consigned to the consignee direct, will exonerate the carrier who delivers in accordance with such a custom.[27] But a local custom to such effect cannot avail against a consignor residing elsewhere, and who had no knowledge of it.[28] And where, by a long course of dealing between the consignee and the holder of the draft with the bill of lading attached, the consignee has been permittd to exercise dominion over the goods while in the hands of the carrier and to direct their delivery, the carrier, in the absence of notice that the bill of lading is being held as security for the purchase price of the goods, will be justified in making delivery without requiring the bill of lading to be produced.[29] But a custom prevailing at the place of delivery to deliver without the production of the bill of lading cannot prevail in the face of a statute prohibiting the carrier from delivery except upon surrender of the bill of lading, unless it has the words "not negotiable" plainly written or stamped upon its face.[30]

Sec. 193. (§ 134.) When consignment may be changed by shipper.—When there has been no agreement to ship the goods which will make the delivery of them to the carrier a delivery to the consignee, and vest the property in him, the shipper may, even after the delivery to the carrier and after the bill of lading has been signed and delivered, or after the goods have passed from the possession of the initial carrier into that of a succeeding one,[31] alter their destination and direct their delivery to another consignee, unless the bill of lading has been forwarded

27. Forbes *v.* Railroad Co., 133 Mass. 154. See also, Bernstein *v.* Railroad Co., 88 N. Y. Supp. 971.

28. Weyland *v.* Railway Co., 75 Iowa, 573.

29. National Bank of Phoenixville *v.* Railroad Co., 163 Penn. St. 467, 30 Atl. Rep. 228.

30. Colgate *v.* Pennsylvania Co., 102 N. Y. 120.

31. Sutherland *v.* Bank, 78 Ky. 250.

to the consignee first named or to some one for his use.[32] But after the carrier or his agent has given one bill of lading or receipt for the goods he cannot give another, unless the first and all the duplicates of the same have been returned to him.[33]

Sec. 194. (§ 135.) Same subject—Consignment cannot be changed by shipper when goods become property of consignee on delivery to carrier.—If, however, the circumstances are such that upon delivery of the goods to the carrier they become the property of the consignee, the carrier holds them as the agent of such consignee, and their destination cannot afterwards be changed without his consent.[34] If, for instance, the consignee is the vendee of the goods, or if he has made advances upon them with the agreement that they shall be shipped to him to be sold in order that he may retain the proceeds for his reimbursement,[35] or if, being a creditor of the consignor, the goods are delivered to the carrier to be shipped to him in satisfaction of his debt according to a previous agreement to that effect, the title to the goods will vest in him upon delivery to the carrier, and if their destination is afterwards altered, except under such circumstances as entitle a vendor to stop them *in transitu*, the carrier will become responsible to him for them. The legal presumption is that when goods are sent to a consignee, the title to them vests in him as soon as the shipment is made. It

32. Blanchard *v.* Page, 8 Gray, 285; Mitchel *v.* Ede, 11 Ad. & El. 888; Ruck *v.* Hatfield, 5 Barn. & Ald. 632; Thompson *v.* Trail, 2 Car. & P. 334; Hartwell *v.* Railroad Co., 99 Ky. 436, 36 S. W. Rep. 183, citing Hutchinson on Carr.; Soper *v.* Tyler, 77 Conn. 104, 58 Atl. Rep. 699.

33. Hubbersty *v.* Ward, 8 Exch. 330.

34. Where goods are left with a carrier to be forwarded without any condition or qualification, the shipper cannot change their destination except under such circumstances as entitle a vendor to stop them in transit. Philadelphia, etc. R. R. Co. *v.* Wireman, 88 Penn. St. 264. See also, Sonia Cotton Oil Co. *v.* The Red River, 106 La. 42, 30 So. Rep. 303, 87 Am. St. Rep. 293, citing Hutchinson on Carr.

35. Destination may be changed where advances have been made, but not upon the credit of this particular shipment. Chaffe *v.* Railroad Co., 59 Miss. 182. As to the right to change destination in Mississippi, see Bonner *v.* Marsh, 10 Smedes & M. 376; Dickman *v.* Williams, 50 Miss. 500.

is solely, however, a question of intention or of agreement, and may be shown to be otherwise.[36]

Sec. 195. (§ 136.) Same subject—Illustrations.—A firm consisting of three partners was indebted to the plaintiffs, who did business in New York, and, to pay its indebtedness, agreed to ship to them certain goods. The goods were delivered to the railway company as a common carrier at Troy, consigned to plaintiffs, and a receipt given by its agents, in which it was agreed that the road would transport and deliver the goods to plaintiffs at New York. After the goods had been thus delivered and the receipt given, one of the members of the firm, in its name, but without the knowledge of the others, was permitted by the agent of the road to change the destination of the goods, and, in pursuance of his order, they were delivered to other consignees in New York, who sold them and turned the proceeds over to him. Plaintiffs demanded the goods of the road, and upon its failure to deliver them brought their action against it and recovered. It was held that the parol agreement to ship the goods was executed by the delivery to the carrier, and that from that time the plaintiffs occupied the legal position of vendees, and that the indebted firm had no right after the delivery to the carrier to direct, nor could the carrier assent to, a change in the consignment. It was considered that it was not important, as contended by the defendant, that the bill of lading was not forwarded or delivered to the plaintiffs, that being mainly entitled to consideration as characterizing the act of the shipper, and as showing the purpose and intent of the delivery to the carrier; but if such intention was shown by other acts of the parties, the retention of the bill of lading by the shipper would be unimportant. It does not appear that the agents of the road had any knowledge of the arrangement between the shippers and

36. Dawes *v.* Peck, 8 T. R. 330; Dutton *v.* Solomonson, 3 B. & P. 582; Holbrook *v.* Wight, 24 Wend. 169; Covell *v.* Hitchcock, 23 *id.* 611; Bushel *v.* Wheeler, 15 Q. B. 442; Waldron *v.* Romaine, 22 N. Y. 368; Stanton *v.* Eager, 16 Pick. 467; Cross *v.* O'Donnell, 44 N. Y. 661; Anderson *v.* Clark, 2 Bing. 20; Walley *v.* Montgomery, 3 East, 585; Haille *v.* Smith, 1 B. & P. 563.

the plaintiffs, nor was that matter alluded to. The case was rested upon the broad ground that the defendant had receipted for the property and agreed to transport safely and deliver to the plaintiffs, and that, instead of complying with the contract, it delivered the property to another by direction of one who had no more legal authority over it than a stranger, without the return even of its receipt. The plaintiffs, it was said, had vested rights which the defendant was bound to respect, and with a knowledge of which it was legally chargeable. It was its duty to deliver the property to the real owner.[1]

Sec. 196. (§ 137.) Same subject—Effect of custom.—Evidence, however, of previous deliveries to one who was neither the consignee nor entitled to the delivery by the terms of the bill of lading or by its assignment, with the knowledge of the owner of the goods and without any objection having been made by him, has been held to justify such a delivery. As where the goods were shipped to New York to the order of the Ontario Bank, the plaintiff, and were delivered by the carrier, without the order of the bank, to a person to whom a number of previous similar shipments had been delivered with its knowledge and without any objection by it, the delivery was held to be justified by this previous course of dealing, the carrier having a right to presume that the party to whom the delivery was made was the agent of the bank, a delivery to an agent being equivalent to a delivery to the owner.[2]

Sec. 197. (§ 138.) Who may sue for breach of the contract.—By the common law the bill of lading conferred upon the assignee only the title to the property in the shipment of which it was the evidence; but all rights growing out of the contract continued in the original shipper with whom it was made; and so the law yet remains except where it has been changed by statute. And for this reason it has been held that the shipper may always sue the carrier for any damage to the goods, whether he has any property, general or special, in them or not. By

1. Bailey *v.* The Railroad, 49 N. Y. 70.

2. Ontario Bank *v.* The Steamboat Co., 59 N. Y. 510.

the assignment of the bill of lading he parts with no right which he originally possessed except that to the possession of the goods, otherwise retaining all his rights under the contract; and if he shipped them as the mere agent of the owner, he may have his action on the contract because it is directly with him.[3] The assignee could therefore bring no action against the carrier upon the contract of affreightment.[4] But the title to the goods having passed to him by the assignment, he might bring trover for a refusal to deliver the goods to him or for their conversion; or detinue or replevin for their possession.[5] But this common-law rule has been changed in England by statute,[6] which has given to bills of lading more of the negotiable quality than they formerly possessed, by conferring upon the assignee all the rights of suit upon the contract created by the bill of lading as if it had been made to the assignee himself.[7]

Sec. 198. (§ 139.) Same subject—Statutes controlling.—The provisions of this statute have not been generally adopted in this country, nor is any such legislation required to confer upon the assignee the right to sue upon the assigned bill of lading in those states in which the assignment of contracts, not strictly negotiable but simply assignable, confers upon the assignee the right to sue upon them in his own name. The ground upon which it was held that he could not sue upon them was that, by the common law, contracts of the kind were not assignable so as to confer the right of action for their breach upon the assignee, and that there was no law or custom of merchants which made bills of lading an exception to that rule. Wherever, therefore, such contracts are made assignable so as to confer upon the assignee the right of action in his own name, it would seem to follow that the law as laid down in the English cases no longer exists; for bills of lading possess no peculiar

3. Blanchard *v.* Page, 8 Gray, 291. See *post*, ch. 14.

4. Thompson *v.* Dominy, 14 M. & W. 403; Howard *v.* Shepherd, 9 Com. B. 297.

5. Tindall *v.* Taylor, 4 El. & B. 219.

6. 18 and 19 Vic.

7. Smurthwaite *v.* Wilkins, 11 Com. B. N. S. 842; Jessel *v.* Bath, L. R. 2 Exch. 267; Short *v.* Simpson, L. R. 1 C. P. 248.

quality, either by law or mercantile usage, which would make them an exception to the law conferring the right upon the assignee to sue in his own name upon assignable as well as upon negotiable instruments.

Sec. 199. By what law the effect of a contract is to be determined.—Questions of the conflict of laws in respect of contracts between common carriers and shippers depend for their solution on the same principles which govern questions of the conflict of laws in respect of ordinary contracts. The difficulty does not lie in the determination of those principles, but it arises in their application to any given set of facts, owing to the many exceptions which exist to every general rule in the law of common carriers. The application of those principles is also complicated by the existence of statutes and constitutional provisions in many states which influence the courts of those states to render decisions which are at variance with what they would otherwise announce as the rule of applicatory law. It seems wise, therefore, to preface an exposition of that subject with the statement of some basic principles which should be accepted generally as true.

Sec. 200. The rights arising out of the contract must be created by law.—In a legal sense, any right arising out of a contract of carriage must be created by some law. No legal right exists by nature, or by the will of the parties. A right is artificial, not a mere natural fact. It does not become a fact until it has been created by some law, but, having been created by some law, its existence may be a factor in an event which the same or some other law makes the condition of a new right. An existing right should everywhere be recognized unless changed by the law that created it or by some other law having power over it; since to do so is merely to recognize the existence of a fact. Questions of the conflict of laws in respect of contracts of carriage, therefore, require for their solution a consideration of three things: 1. Whether a right has been created by some law and by what law. 2. How far a right created abroad will be given effect. 3. What remedy will be granted for making it

effective.[8] A consideration of those three things in reference to contracts of carriage containing only ordinary provisions for the carriage of the goods should be had separate from contracts in which the carrier's liability for negligence is sought to be limited, since the first do not contravene the public policy of a state, and the latter may.

Sec. 201. Lex loci contractus will govern in the great majority of cases.—Taking up for consideration, then, those contracts in which no right of the carrier to limit his common-law liability is sought to be enforced, the general rule is that any obligation arising out of a contract is created by the law of the place where the acts are done out of which the obligation arises. This does not mean in respect of a written contract that the creation or non-creation of a right arising out of that contract must necessarily be determined by the law of the place where the signatures are actually affixed to the paper, for in the case of parties traveling on a railroad train through several states and consummating a contract thereon, it would be folly to hold that the law of that state necessarily would govern through which the parties happened to be passing at the time the contract was signed. It merely means that the acts of the parties and the surrounding circumstances in each particular case will be closely scrutinized, and, from those acts and circumstances, the court will infer that the law of some one state governed in the creation of rights arising out of that contract. In the great majority of cases, however, the acts of the parties and the surrounding circumstances are such that it would be difficult, if not impossible, to determine what law governed. A court, therefore, must resort to a legal fiction for its guidance, and the legal fiction that has been settled upon by almost all courts is that the law of the place where the contract is made must, in the absence of proof of the intention of the parties to the contrary at the time of making the contract, be looked to for the creation of, obliga-

8. See the excellent summary Laws, Vol. III., for the foregoing in Beale's Cases on Conflict of principles.

tions imposed by, and interpretation of any rights arising out of it.[9]

Sec. 202. When performance wholly within one state, the law of that state governs.—The foregoing rule being merely

9. *United States.*—Railway Co. *v.* Kavanaugh, 92 Fed. 56, 34 C. C. A. 203.

California.—Palmer *v.* Railroad, 101 Cal. 187, 35 Pac. Rep. 630.

Connecticut.—"The rule upon that subject is well settled, and has often been recognized by this court, that contracts are to be construed acording to the law of the state where made, unless it is presumed from their tenor, that they are entered into with a view to the law of some other state." Hale *v.* New Jersey Steam Navigation Co., 15 Conn. 539.

Illinois.—Railroad Co. *v.* Jagger-man, 115 Ill. 407, 4 N. E. Rep. 641; Railroad Co. *v.* Boyd, 91 Ill. 268; Railroad Co. *v.* Smith, 74 Ill. 197; Merchants' Dispatch Transp. Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265, *affirming* 47 Ill. App. 561; Fortier *v.* Pennsylvania Co., 18 Ill. App. 260.

Iowa.—McMillan *v.* American Express Co., 123 Iowa 236, 98 N. W. Rep. 629; Beard *v.* Railway Co., 79 Iowa 527.

Minnesota.—Powers Mercantile Co. *v.* Wells, Fargo & Co., 93 Minn. 143, 100 N. W. Rep. 735.

Missouri.—Hartmann *v.* Railroad Co., 39 Mo. App. 88; Nenno *v.* Railroad, 105 Mo. App. 540, 80 S. W. Rep. 24.

New York.—The obligation of the shippers of the cargo is to be determined by the law of the place where the contract was made, not by the "law of the flag." Insurance Co. *v.* Force, 142 N. Y. 90, 36 N. E. Rep. 874, 40 Am. St. Rep. 576, *affirming* 20 N. Y. Supp. 796.

In First National Bank *v.* Shaw, 61 N. Y. 283, grain was purchased at Toledo, Ohio, and shipped thence to certain consignees in New York. The bills of lading were assigned to the bank to secure advances made by it for the purpose of paying for the purchase, and it became important in the litigation which grew out of the transaction to show the meaning of certain words or notations written upon the face of the bills, and evidence was offered of their commercial meaning at Toledo, to which objection was made upon the ground that the contracts of affreightment were New York and not Ohio contracts. But the objection was not sustained. "The advance of the money," said the court, "was made in Ohio, the transfer of the grain took place there, and the bank, as between itself and the persons with whom it dealt, were entitled to repayment there. . . . In the more general case, where a contract is made in one country and to be performed in another, it is not always easy to determine according to the authorities whether the interpretation of the words is to be governed by the law of the place where the contract is made or by that where it is to be performed. The general principle is, that the law of the place where the contract is made is to govern, unless it is positively to be performed

a legal fiction for the better guidance of the court it seems reasonable that where the performance of a contract is to be had wholly within one state, the creation of the rights arising out of it should be governed by the laws of that State. And in Brown *v.* The Camden, etc. R. R.,[10] where the contract was made with the railroad company at its wharf in Philadelphia to transport the plaintiff and his baggage from that point to Atlantic City, it was held that, as the contract was with a New Jersey company to be performed in that state, although its perform-

elsewhere. The fact that acts are to be done abroad under a contract does not necessarily make it a contract to be performed there, in a legal sense. Thus, it has been said that a policy of insurance executed in England on a French ship for a French owner, on a voyage from one French port to another, is to be interpreted as an English contract. Don *v.* Lippmann, 5 Cl. & F. 1. The true inquiry is, what was the intent of the parties? It would seem that in a case like the present, where the contract was made in Ohio, by Toledo parties, the money being advanced there and the security there, that they had in view, in employing words, their own usages, even though the goods were to be sent to another state and ultimately sold there if the advances were not repaid."

Pennsylvania.—Fairchild *v.* Railroad, 148 Pa. St. 527, 24 Atl. Rep. 79.

South Carolina.—Frasier *v.* Ry. Co., —— S. Car. ——, 52 S. E. Rep. 964.

Texas.—In Cantu *v.* Bennett, 39 Tex. 303, where the contract was to carry a large amount of coin from Pieras Negras in Mexico to San Antonio in Texas, the bill of lading having been given in Mexico and in the Spanish language, it was held that the carrier could not be made responsible for its loss by robbery by an armed force on the route and after he had entered the state of Texas, because it was said that the civil law in force in Mexico did not hold the carrier responsible where the subject of the bailment had been taken from him or destroyed by a *vis major* or robbery when perpetrated by irresistible force; 1 Domat. 484: Story on Bail., §§ 26, 458, and this being the law by which the obligation of the carrier was to be measured, he was excusable. See also, National Bank of Bristol *v.* Railroad Co., 99 Md. 661, 59 Atl. Rep. 134, 105 Am. St. Rep. 321.

In Railway *v.* Kavanaugh, *supra*, Palmer *v.* Railroad, *supra*, Railroad *v.* Jaggermann, *supra*, Railroad *v.* Smith, *supra*, Fortier *v.* Pennsylvania Co., *supra*, and Nenno *v.* Railroad, *supra*, the question was whether the carrier assumed any liability beyond its own line by accepting goods directed to a point beyond its own line.

10. 83 Pa. St. 316.

ance required the transportation of the plaintiff and his baggage across the Delaware river, its validity and effect were to be determined by the law of New Jersey and not by that of Pennsylvania. But the court made it very clear that in its opinion the contract was to be performed wholly within the State of New Jersey. That fact has been entirely lost sight of in other cases which have tried to use Brown *v.* The Camden, etc., R. R. as enunciating the erroneous doctrine that it is the law of the place where the breach of a contract occurs by which the mode of its fulfillment and the measure of liability for its breach must be determined.[11]

Sec. 203. Matters relating solely to delivery may be determined by law of place of delivery.—So matters relating solely to the delivery may be determined by the law of the place of delivery while the creation of the rights relating to the carriage itself are governed by the law of the place of contract. The decisive question in each case is whether a particular stipulation in the contract refers to matters which affect the duty of the carrier as to the mode and manner of transportation at any and every point in the journey, or whether it refers only to the carrier's duty as to the mode and manner of actual delivery at the place of destination.[12]

11. See Hughes v. Pensylvania R. R. Co., 202 Pa. 222, 51 Atl. Rep. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713.

12. Herf & Frerichs Chemical Co. *v.* Railroad, 70 Mo. App. 274, 100 Mo. App. 164, 73 S. W. Rep. 346; Springs *v.* Railroad Co., 46 S. C. 104, 24 S. E. Rep. 166.

"One of the rules applicable to the subject is that the *lex loci contractus* is to govern, unless it appears upon the face of the contract that it was to be performed in some other place, and then the rule of interpretation is governed by the law of that place. * * * The place of delivery was a material and important part of the contract, and until such delivery, the same was not completed and fulfilled. Upon a failure to deliver the baggage to the plaintiff, in the city of New York, there was a breach of the contract; and as the final place of performance was in that city, it would seem to follow that, within the rule laid down, the contract was to be performed, *at least so far as a delivery is concerned*, by the laws of New York. This certainly was to be done in a different place from where the contract was made, and it is a reasonable inference that it was in the con-

Sec. 204. In actions against carriers of goods, same law governs whether the form of action is assumpsit or tort.—In actions against common carriers, whether the actions are actions of assumpsit upon the contract or actions upon the case for negligence the rights and liabilities of the parties must be judged by the same standard. The form of the action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action the liability of the carrier and the rights of the shipper are based upon the contract. The carrier owes no duty to shippers except in virtue of the contracts, and the obligations for the violation and breach of which an action may be brought are only coextensive with the contracts made. When a shipper makes a contract with a common carrier, therefore, and the appropriate law has created certain rights and obligations, those rights and obligations cannot be increased or decreased by a mere change of the form of action from assumpsit to tort.[13]

Sec. 205. In actions for personal injuries against carriers of passengers, lex loci delicti governs—Contributory negligence governed by same law—Proof of lex loci delicti must be made.—In actions against carriers of passengers for personal injuries the rules cited in the preceding section do not apply. The law of all the states imposes more or less varying duties and obligations on carriers of passengers, irrespective of the contracts which may have been entered into by the carrier with the passengers. A passenger may, therefore, elect to disregard the contract and the rights arising out of it, and sue upon the common-law or statutory breach of duty by the carrier. In such case the law of the place where the injury occurs must always govern, for that law only can impose common-law or statutory duties within its territory. The carrier, of course, may plead his contract as a defense, but the question as to whether any rights were created by such contract sufficient to stand as a

templation of the parties at the time, and that it was entered into with reference to the laws of the place where it was to be delivered." Curtis *v.* Railroad, 74 N. Y. 116.

13. Dyke *v.* Railroad, 45 N. Y. 113, 6 Am. Rep. 43.

shield for the consequences of his breach of a common-law or statutory duty must be governed entirely by the law of the same place which created that duty. The rights given by the *lex loci delicti* can only be defeated by defenses which are good under the *lex loci delicti*.[14] By parity of reasoning, what constitutes, and the effect of, contributory negligence of passengers is governed by the *lex loci delicti*.[15]

Proof of the *lex loci delicti* must be made on the trial of the case, and in the absence of such proof the law of the forum will be applied on the presumption that the *lex loci delicti* was the same.[16]

Sec. 206. Rights created by foreign law should be enforced elsewhere—Exceptional rule in federal and New York courts.

When a right, connected with a contract of carriage, has once been created by the appropriate law, it should be enforced everywhere, even where it would not originally have been created upon the same facts. This doctrine has been recognized as a matter of comity in numerous state court decisions, and the rights created by foreign law have been recognized as foreign facts which would be enforced.[17] In one case in New York, however, it has been held that "where a great principle of com-

14. Railroad Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225; Railroad Co. *v.* Masterson, 16 Ind. App. 323, 44 N. E. 1004; Railroad Co. *v.* Miller, 19 Mich. 305; Davis *v.* Railway Co., —— Ky. L. R. ——, 92 S. W. Rep. 339; Pullman Palace Car Co. *v.* Lawrence, 74 Miss. 782, 22 So. Rep. 53; Railroad Co. *v.* Sprayberry, 9 Heisk. 852, 8 Baxt. 341, 35 Am. Rep. 705; Railroad Co. *v.* Eakin, 6 Coldw. 582; Lake Shore, etc., Ry. Co. v. Teeters, —— Ind. ——, 77 N. E. Rep. 599, *affirming* —— Ind. App. ——, 74 N. E. Rep. 1014.

15. Clark *v.* Russell, 97 Fed. 900, 38 C. C. A. 541; Railroad Co. *v.* Whitlow, 105 Ky. 1, 43 S. W. Rep. 711, 41 L. R. A. 614; Bridger *v.* Railroad Co., 27 S. C. 456, 3 S. E. Rep. 860, 13 Am. St. Rep. 653; Railroad Co. *v.* Lewis, 89 Tenn. 235, 14 S. W. Rep. 603. *But see*, Johnson *v.* Railroad Co., 91 Iowa 248, 59 N. W. 66.

16. Railroad Co. *v.* Gondola, 50 Neb. 906, 70 N. W. Rep. 491.

17. Palmer *v.* Railroad Co., 101 Cal. 187, 35 Pac. Rep. 630; Hale *v.* New Jersey Steam Navigation Co., 15 Conn. 539; Railroad Co. v. Boyd, 91 Ill. 268; Railroad Co. *v.* Smith, 74 Ill. 197; McMillan *v.* American Express Co., 123 Iowa 236, 98 N. W. Rep. 629; Beard v. Railway Co., 79 Iowa 527; Powers Mercantile Co. *v.* Wells, Fargo &

mercial law has been established, which is universally acknowledged and acquiesced in, the law announced by the courts of a single state can not overturn that principle and control the decisions of the courts of another and a distant state."[18] The difficulty with that case is that no principle of commercial law can be deemed unimportant, for every one may be all-important in its own particular set of facts; hence if the doctrine announced by the New York court were accepted as correct, all questions of the Conflict of Laws would be eliminated, since every court of the forum would be prone to follow its own decisions as to the "universally acknowledged and acquiesced in" principle of commercial law. That is, however, the firmly established rule in the United States courts, especially, as we shall hereafter see, with reference to limitations of the carrier's liability,[19] although once in a great while a Federal court has been known to follow the general rule stated at the beginning of this section.[20] The attitude of the United States courts has been severely criticized by the Supreme Court of Pennsylvania.[21]

Sec. 207. Proof should be made in court of forum of what the foreign law is.—In order to ascertain whether a right has been created by the foreign law, proof should be made in the court of the forum of what the foreign law is. In the absence of such proof of the foreign law, it will be presumed in the majority of states to be the same as the law of the forum, even though the law of the forum is statutory.[22] In Missouri, how-

Co., 93 Minn. 143, 100 N. W. Rep. 735; Hartmann *v.* Railroad, 39 Mo. App. 88; First National Bank *v.* Shaw, 61 N. Y. 283; Cantu *v.* Bennett, 39 Texas 303.

18. Faulkner *v.* Hart, 82 N. Y. 413, 37 Am. Rep. 574.

19. See *post*, sec. 215.

20. Railway Co. *v.* Kavanaugh, 92 Fed. 56, 34 C. C. A. 203.

21. Forepaugh *v.* Railroad Co., 128 Pa. St. 217, 18 Atl. Rep. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672.

22. Palmer *v.* Railroad Co., 101 Cal. 187, 35 Pac. Rep. 630; Pierce *v.* Railroad Co., 120 Cal. 156, 40 L. R. A. 350, 47 Pac. Rep. 874, 52 Pac. Rep. 302; Davis *v.* Railway Co., 83 Iowa 744, 49 N. W. Rep. 77; Hudson *v.* Railroad Co., 92 Iowa 231, 60 N. W. Rep. 608, 54 Am. St. Rep. 550; Meuer *v.* Railroad, 5 S. Dak. 568, 59 N. W. Rep. 945, 25 L. R. A. 81, 49 Am. St. Rep. 898; *s. c.* 11 S. Dak. 94, 75 N. W. Rep. 823, 74 Am. St. Rep. 774; Railroad *v.* Naive, 112 Tenn. 239,

ever, it has been held that, in the absence of the proof of a foreign statute, that court will not presume that a statute exists in a sister state similar to a statute in Missouri. The common law will be presumed to prevail.[23]

Sec. 208. Matters relating to remedy are governed by law of the forum.—The remedy afforded for the enforcement of a foreign right in such only as a state may choose to allow, and all matters relating merely to the remedy are determined by the law of the forum. Thus a limitation of the time within which suit shall be brought is governed by the law of the forum.[24] It would also seem, on the authority of other than carrier cases, that, if the defense of the statute of limitations is set up, it is the statute of the forum which governs,[25] unless the right has previously been extinguished by some statute having power to do so.[26]

In Massachusetts the question of assent on the part of the shipper to the terms of a bill of lading has been held to be one of evidence, to be determined by the law of the forum.[27] But the case so holding has been expressly disapproved, and rightly, in Missouri on the ground that the sufficiency of the assent of the shipper to the contract is a matter appertaining to the creation of rights arising out of the contract, and is to be adjudged in a foreign tribunal in accordance with the law which creates the contract rights, and not the law of the forum.[28]

Sec. 209. A state may require care and diligence of carrier,

79 N. W. Rep. 124, 64 L. R. A. 443; National Bank of Bristol *v.* Railroad Co., 99 Md. 661, 59 Atl. Rep. 134, 105 Am. St. Rep. 321.

23. Nenno *v.* Railroad, 105 Mo. App. 540, 80 S. W. Rep. 24.

24. Express Co. *v.* Walker, 26 Ky. L. Rep. 1025, 83 S. W. Rep. 106.

"It is well settled that whatever concerns the rights of parties, especially in matters of contract, is governed by the *lex loci contractus*, while the remedy, including whatever relates to the limitation of actions, etc., must be determined by the *lex fori*." Brooke *v.* Railroad, 108 Pa. St. 529.

25. Townsend *v.* Jennison, 9 How. 407.

26. The Harrisburg, 119 U. S. 199.

27. Hoadley *v.* Transportation Co., 115 Mass. 304, 15 Am. Rep. 306.

28. Hartmann *v.* Railroad, 39 Mo. App. 88; See also Powers Mer-

although contract is one for interstate carriage.—Thus far we have dealt only with contracts in which no question of public policy arises, and we must now take up those contracts containing limitations of liability which may be against the public policy of a state. A state, nothwithstanding express provisions of the contract to the contrary, may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties. There is no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts.[29] But it should be remembered that the public policy of any one of three states may be against limitation of the carrier's liability, namely, the state where the contract is made, the state where it is to be performed, and the state where it is sought to be enforced. Some courts have attempted to add a fourth—the state where the breach of the contract of carriage occurs—and this leads to the question whether a contract of affreightment is, as to performance, divisible or indivisible.

Sec. 210. Better rule is that performance of contract of carriage is indivisible.—On principle it would seem that the carrier's contract does not vary with each jurisdiction in which it may be partly performed, for the service rendered is single; the transportation performed and the liability assumed being the measure on the one side by which the compensation to be paid on the other side is determined. Whatever is done in

cantile Co. *v.* Wells, Fargo & Co., 93 Minn. 143, 100 N. W. 735, in which the court applied the Missouri rule without expressly so holding.

29. Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. R. 132; Davis *v.* Railroad Co., 93 Wis. 470, 67 N. W. Rep. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935; Railroad Co. *v.* Patterson Tobacco Co., 92 Va. 670, 24 S. E. Rep. 261, 41 L. R. A. 511; *affirmed in* 169 U. S. 311, 42 L. Ed. 759, 18 Sup. Ct. R. 335; Railroad Co. *v.* Taber, 98 Ky. 503, 32 S. W. Rep. 168, 36 S. W. Rep. 18, 34 L. R. A. 685.

intermediate states is a part of the single act of transportation from the place of departure to the place of destination in performance of an obligation assumed and undertaken in some one state, and which is indivisible. The obligations arising out of a contract can only be created by the laws of one state, and force and effect should be given them in conformity with the law of the state which created them. These obligations should not vary from time to time as goods pass from state to state. Having been created by the laws of *one* state, those obligations are *facts* which should be recognized as such in other states. It is a totally different question whether the courts of other states will lend their aid to *enforce* those facts.[30]

30. Liverpool, etc., Steam Co. *v.* Insurance Co., 129 U. S. 397, 9 Sup. Ct. R. 469, 32 L. Ed. 788; The Henry B. Hyde, 82 Fed. 681, *affirmed in* 90 Fed. 115, 32 C. C. A. 534, 61 U. S. App. 147; Railroad Co. *v.* Beebe, 174 Ill. 13, 50 N. E. Rep. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253; McDaniel *v.* Railway Co., 24 Iowa 412; Meuer v. Railway Co., 5 S. Dak. 568, 59 N. W. Rep. 945, 25 L. R. A. 81, 49 Am. St. Rep. 898; *s. c.* 11 S. Dak. 94, 74 Am. St. Rep. 774, 75 N. W. Rep. 823.

In Dyke *v.* Erie Railway Co., 45 N. Y. 113, the court said: "The contracts before us were made in the State of New York, and between citizens of that State. The plaintiffs were actual inhabitants, and the defendant was a corporation existing by the laws of that State. The contracts were for the carriage and conveyance of the plaintiffs over the road of the defendant, between two places in the same State, to-wit, from stations on the line of the road, in the western part of the State to the city of New York. Although the route and line of the defendant's road between the places at which the plaintiffs took their passage and their destination, passed through portions of the States of Pennsylvania and New Jersey, by the consent of those States respectively, the parties cannot be presumed to have contracted in view of the laws of those States. The contracts were single and the performance one continuous act. The defendant did not undertake for one specific act, in part performance in one State, and another specific and distinct act in another of the States named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania, was a part of the single act of transportation from Attica or Waverly, in the State of New York, and in performance of an obligation assumed and undertaken in this State, and which was indivisible. The obligation was created here, and by force of the laws of this State, and force and effect must be given to it, in conformity to the laws of New

Sec. 211. Some states hold performance of contract of carriage divisible—Rights of parties to be construed by law of place where negligent breach occurs.—All the cases holding that a contract of carriage is divisible are early ones with the exception of a few cases in Pennsylvania and Kentucky. The early cases were based on a strained construction of one of Judge Story's opinions.[31] The Pennsylvania court[32] cites as authority for its position several prior Pennsylvania decisions and an Ohio decision which was based upon an entirely different principle,[33] and the Kentucky court was evidently trying to limit the scope of the constitutional provision in Kentucky which renders void limitations of the carrier's liability.[34] The rule cannot be sustained on principle and leads to absurdities.[35]

Sec. 212. Lex loci contractus generally governs validity of limitations of carrier's liability.—By the weight of authority,

York. * * * The performance was to commence in New York, and to be fully completed in the same State, but liable to breach, partial or entire in the States of Pennsylvania and New Jersey, through which the road of the defendant passed, but whether the contract was broken, and if broken, the consequences of the breach should be determined by the laws of this State. It cannot be assumed that the parties intended to subject the contract to the laws of the other States, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those States and the *lex loci contractus*."

In Pittman *v.* Express Co., 24 Tex. Civ. App. 595, 59 S. W. Rep. 949, *id.* 30 Tex. Civ. App. 626, 71 S. W. Rep. 312, the court said: "The carrier's contract does not vary with each jurisdiction in which it may be partly performed for the service rendered is single; the transportation performed and the liability assumed being the measure on the one side by which the compensation to be paid on the other side is determined."

31. Pope *v.* Nickerson, 3 Story 465, Fed. Cas. No. 11,274.

32. Hughes v. Pennsylvania R. Co., 202 Pa. 222, 51 Atl. Rep. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713.

33. Railroad Co. *v.* Sheppard, 56 Ohio St. 68, 46 N. E. Rep. 61, 60 Am. St. Rep. 732.

34. Railway Co. *v.* Druien, 26 Ky. L. Rep. 103, 80 S. W. Rep. 778, 66 L. R. A. 275.

35. The following cases uphold the view that the performance of a contract of carriage is divisible: Carpenter *v.* Railroad Co., 72 Me. 388, 39 Am. Rep. 340; Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Gray *v.* Jackson, 51 N. H. 9, 12 Am. Rep. 1; Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42; Burnett *v.* Railroad, 176 Pa. St. 45, 34 Atl. Rep. 972. (This case

then, the performance of a contract of affreightment must be regarded as indivisible. Being indivisible the rights arising out of the contract are created by but one law, but the question remains, "What law creates those rights?" The same rules which we have noticed in respect of contracts of affreightment in general, also apply to contracts containing limitations of the carrier's liability. If the acts of the parties were such that it is impossible to determine what law governed in the creation of the rights arising out of the contract, a court will resort to the legal fiction that the law of the place where a contract of carriage was made, must, in the absence of proof of the intention of the parties to the contrary at the time of making the contract, be looked to for the validity (i. e., the creation) of any rights arising out of it.[36]

is cited in the Hughes case, but can easily be distinguished). Cappel *v.* Weir, 92 N. Y. Supp. 365, *s. c.* 90 N. Y. Supp. 394. (Not holding the Pennsylvania rule to be correct, but enforcing it on the principle of comity.)

In Hughes *v.* Pennsylvania R. Co., 202 Pa. 222, 51 Atl. Rep. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713, Potter, J., in delivering the court's opinion, said: "Where a contract containing a stipulation limiting liability for negligence is made in one state, but with a view to its performance by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state where its negligent breach, causing injury, occurs."

In Railway Co. *v.* Druien, 26 Ky. L. Rep. 103, 80 S. W. Rep. 778, 66 L. R. A. 275, the court said: "Where a contract of shipment is made to be partly performed in another state where made and partly in this state, the agreement of the parties, if valid where made, ought to bind them as to all rights and defenses accruing under the contract in that state, although the provision could not be binding if made here. But as to that part of the contract that is to be performed in Kentucky, it will be read in the light of the laws and Constitution of this state, and be construed and applied accordingly. * * * * That contracts to be performed partly in two states will be construed according to the laws of each of the states relating to the portions to be performed there respectively is sustained in Bishop on Contracts, sec. 1394."

36. *In re* Missouri Steamship Co., 42 Ch. D. 321, 58 L. J. Ch. (N. S.) 721, 61 L. T. N. S. 316; McDonald *v.* Railway Co., 31 Ont. R. 663; Western R. R. Co. *v.* Exposition Cotton Mills, 81 Ga. 522 7. S. E. Rep. 916, 2 L. R. A. 102; Railroad Co. *v.* Beebe, 174 Ill. 13, 50 N. E. Rep. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253, *affirming* 69

Sec. 213. Presumption exists that that law applies which is most favorable to the validity of the contract.—What, then, is sufficient evidence to rebut this *prima facie* presumption that the *lex loci contractus* will govern the creation of the rights arising under a contract? In the first place, it must be presumed that the parties to a contract do not deliberately execute an agreement knowing that it is invalid. The carrier must intend to secure to himself some real protection from responsibility in the cases excepted in the bill of lading, and the shipper that he shall have this protection. "When there are several possible local laws applicable to the case, that law is to be

Ill. App. 363; McDaniels *v.* Railway Co., 24 Iowa 412; Talbott *v.* Merchants' Dispatch Transp. Co., 41 Iowa 247, 20 Am. Rep. 589; Hazel *v.* Railroad Co., 82 Iowa 477, 48 N. W. Rep. 926; Hudson *v.* Railroad Co., 92 Iowa 231, 60 N. W. Rep. 608, 54 Am. St. Rep. 550; Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. Rep. 665; O'Regan *v.* Steamship Co., 160 Mass. 356, 35 N. E. Rep. 1070, 39 Am. St. Rep. 484; Brockway *v.* Express Co., 171 Mass. 158, 50 N. E. Rep. 626; *s. c.* 168 Mass. 257, 47 N. E. Rep. 87; Otis *v.* Railway, 112 Mo. 622, 20 S. W. Rep. 676; Herf & Frerichs Chemical Co. *v.* Railroad, 100 Mo. App. 164, 73 S. W. 346; *s. c.* 70 Mo. App. 274; Barnes *v.* Railroad Co., 93 N. Y. Supp. 616; Grand *v.* Livingston, 38 N. Y. Supp. 490, 4 App. Div. 584; *affirmed* 158 N. Y. 688, 53 N. E. Rep. 1125; Robertson *v.* National Steamship Co., 37 N. Y. Supp. 65, 1 App. Div. 61, 72 N. Y. St. 223; Knowlton *v.* Railroad Co., 19 Ohio St. 260, 2 Am. Rep. 395; Meuer v. Railway Co., 5 S. Dak. 568, 59 N. W. Rep. 945, 25 L. R. A. 81, 49 Am. St. Rep. 898; *s. c.*, 11 S. Dak. 94, 75 N. W. Rep. 823, 74 Am. St. Rep. 774; Ryan *v.* Railroad Co., 65 Texas 13, 57 Am. Rep. 583; Railroad Co. *v.* Ware, (Tex. Civ. App.) 60 S. W. Rep. 343; Davis *v.* Railroad Co., 93 Wis. 470, 67 N. W. Rep. 16, 33 L. R. A. 654, 57 Am. St. Rep. 935.

See *contra* Railroad Co. *v.* Sheppard, 56 Ohio St. 68, 46 N. E. Rep. 61, 60 Am. St. Rep. 732, resting on the principle that the obligation is to deliver the goods at destination, and hence the law of the destination should govern in the creation of the rights arising out of it.

See also Williams *v.* Railroad Co., 88 N. Y. Supp. 434, 93 App. Div. 582, where a passenger going from New York to New Jersey failed to find her trunk at the station of departure so she could check it. She accepted a check from the baggage master on his promise to forward the trunk. On presentation of the check at her destination she failed to receive the trunk, the trunk having been stolen from the carrier prior to the reception of the check. The court held that the loss occurred in New Jersey (?) and the rights of the parties were governed by New Jersey law.

applied which is most favorable to the contract; or, to state the rule in other phraseology, when there is a conflict of applicatory laws, the parties are presumed to have made part of their agreement that law which is most favorable to its validity and performance.[37] There are, therefore, two presumptions to apply to every question of what law governs the creation of rights arising out of a contract of carriage containing limitations of the carrier's liability for negligence: First, that the *lex loci contractus* will govern in the great majority of cases. Second, that the parties intended that law to govern which would give effect to all the provisions of the contract. When those two presumptions point to the same place, it is almost conclusive that the law of that place should govern. When they neutralize each other by pointing in opposite directions, the court must then rest its decision entirely on evidence extrinsic of either presumption.

Sec. 214. Facts extrinsic of presumptive evidence may be considered by the court to determine what law governs.—The extrinsic evidence on which the court will rest its decision when the two presumptions are in conflict, will vary with every given set of facts. Some inference, however, may be drawn from any combination of the following facts or other facts along the same line:

1. When the state where the contract is to be performed is the legal residence of the carrier and the actual residence of the shipper.[38]

37. Talbott *v.* Merchants' Dispatch Transp Co., 41 Iowa 247, 20 Am. Rep. 589; Hazel *v.* Railroad Co., 82 Iowa 477, 48 N. W. Rep. 926; Grand *v.* Livingston, 38 N. Y. Supp. 490, 4 App. Div. 584; *affirmed*, 158 N. Y. 688, 53 N. E. Rep. 1125; Ryan *v.* Railroad Co., 65 Tex. 13, 57 Am. Rep. 583.

Contra, Brockway *v.* Express Co., 171 Mass. 158, 50 N. E. Rep. 626; *s. c.* 168 Mass. 257, 47 N. E. Rep. 87.

38. Grand *v.* Livingston, 38 N. Y. Supp. 490, 4 App. Div. 584; *affirmed*, 158 N. Y. 688, 53 N. E. Rep. 1125; *In re* Missouri Steamship Co., 42 Ch. D. 321, 58 L. J. Ch. N. S. 721, 61 L. T. N. S. 316; Herf & Frerichs Chemical Co. *v.* Railroad, 100 Mo. App. 164, 73 S. W. Rep. 346; *s. c.*, 70 Mo. App. 274; Dyke *v.* Erie Railway Co., 45 N. Y. 113; Liverpool, etc., Steam Co. *v.* Insurance Co., 129 U. S. 397, 9 Sup. Ct. R. 469, 32 L. Ed. 788.

Contra. Brockway *v.* Express

2. That the performance was to be had entirely in another state.[39]

3. That the forms of the contract or bills of lading were those used in a particular state or country.[40]

4. That the parties stipulated in their contract that the rights arising under it should be governed by the laws of a certain state or country. Some courts would probably hold such a stipulation conclusive, but it would seem to be more reasonable to regard such a stipulation merely as evidence, the weight of which should be determined by the court.

Thus a case may be supposed where parties both residing in A desire to enter into a contract for the carriage of goods from A to B, the contract to contain stipulations which would be void under the laws of both A and B. They thereupon cross over the line from A to C, and sign the contract at C for the carriage of goods from A to B. It seems clear that in such a case a stipulation that the rights of the parties should be governed by the laws of C should not be taken as conclusive, but merely regarded as evidence, the cogency of which should be passed upon in connection with all the other acts of the parties and circumstances surrounding the transaction.

The Federal courts, of course, and probably the courts of Nebraska, always will refuse to recognize the validity of such a stipulation as to a limitation which is opposed to their public policy.[41]

The inference from the first two facts could be overcome by showing that in another and supplemental contract, the parties were careful to provide that the contract should be governed by

Co., 171 Mass. 158, 50 N. E. Rep. 626; *s. c.*, 168 Mass. 257, 47 N. E. Rep. 87.

39. Brown *v.* The Camden, etc., R. R., 83 Pa. St. 316; Grand *v.* Livingston, *supra; In re* Missouri Steamship Co., *supra.*

Contra. Brockway *v.* Express Co., *supra.*

40. *In re* Missouri Steamship Co., *supra.*

Contra. Brockway *v.* Express Co., *supra.*

41. The Kensington, 183 U. S. 263, 46 L. Ed. 190, 22 Sup. Ct. R. 102; Railroad Co. *v.* Gardiner, 51 Neb. 70, 70 N. W. 508; Railroad Co. *v.* Kennard, etc., Co., 59 Neb. 435, 81 N. W. 372; Wabash R. Co. *v.* Sharpe, —— Neb. ——, 107 N. W. Rep. 758.

the law of the state of performance, thus justifying the conclusion that the parties were aware of the importance of bringing the contract within the law of a particular state and making the omission in the original contract possess a significance which cannot be disregarded, and when the contract, if construed by other than the law of the place of execution would be most unreasonable and would leave the shipper at the mercy of the carrier.[42]

The fact that a carrier is organized under the laws of a state where no carrier is permitted to contract for relief from its common law liability does not deprive it of the right to specially contract against its common law liability in another state, the same not being in violation of the laws of such state, the goods being there and the contract not even providing that the goods should pass through the first state.[43]

Sec. 215. Enforcement of limitation, valid in one state, by courts of another state.—The state which creates the rights arising out of a particular contract having been ascertained, full force and effect should be given by sister states on the ground of comity to the foreign facts thus created, even though the same rights would not have been created by the law of the forum.[44] The United States courts and a few state courts refuse to recognize that principle on the ground of public policy.

The United States courts by a long line of decisions extending through many years, and in cases wherein was involved the

42. Grand *v.* Livingston, *supra.*

43. Tecumseh Mills *v.* Railroad, 22 Ky. L. Rep. 264, 108 Ky. 572, 57 S. W. Rep. 9, 49 L. R. A. 557; Thomas *v.* Lancaster Mills, 63 Fed. 200, *affirmed*, 71 Fed. 481, 19 C. C A. 88, 34 U. S. App. 404.

44. See the many cases cited in preceding sections in which the courts have enforced a foreign fact founded on a law differing from their own, also the following cases:

Railroad Co. *v.* Beebe, 174 Ill. 13, 50 N. E. Rep. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253, *affirming*, 69 Ill. App. 363; O'Regan *v.* Steamship Co., 160 Mass. 356, 35 N. E. Rep. 1070, 39 Am. St. Rep. 484; Brockway *v.* Express Co., 171 Mass. 158, 50 N. E. Rep. 626; *s. c.* 168 Mass. 257, 47 N. E. Rep. 87; Grand *v.* Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490; *affirmed*, 158 N. Y. 688, 53 N. E Rep. 1125; Barnes *v.* Railroad Co., 93 N. Y. Supp. 616; Knowlton *v.* Railroad Co., 19 Ohio St. 260, 2 Am. Rep. 395.

liability of a common carrier, have established the rule that the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from liability for his own negligence, is not a local question upon which the decision of a state court must control; but that such question is a matter of general law upon which the courts of the United States will exercise their own judgment, even where their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law, of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. In other words, a limitation of the carrier's liability, when opposed to the public policy of the United States, will never be upheld in the United States courts, no matter what law governed in the creation of the rights arising out of such a contract.[45] And if a suit is brought in a state court where the plaintiff is entitled to the benefit of a state prohibition against a stipulation or condition in the contract limiting the time within which plaintiff might enforce his right by legal proceedings, the defendant cannot, by removing the case to the Federal court on the ground that it is a citizen of another state, deprive the plaintiff of such a substantive right.[46]

The same rule which obtains in the United States courts also obtains in Nebraska, where a constitutional provision exists expressly prohibiting carriers from limiting their common law liability. The courts of that state therefore will not recognize or enforce such a stipulation, wherever made.[47]

A decision of the Court of Civil Appeals in Texas lays down

45. The Kensington, 183 U. S. 263, 22 Sup. Ct. R. 102, 46 L. Ed. 190; *reversing*, 94 Fed. 885, 36 C. C. A. 553 and 88 Fed. 331; Railway Co. *v.* Kempton, 138 Fed. 792, (C. C. A.); The New England, 110 Fed. 415; The Glenmavis, 69 Fed. 472; The Hugo, 57 Fed. 403 and 61 Fed. 860; *affirmed*, Brauer *v.* Compania de Navigacion de Flecha, 66 Fed. 777, 35 U. S. App. 44 and Compania de Navigacion de Flecha *v.* Brauer, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398; Lewisohn *v.* Steamship Co., 56 Fed. 602; Eells *v.* Railroad Co., 52 Fed. 903; The Iowa, 50 Fed. 561; The Trinacria, 42 Fed. 863. But see The Oranmore, 92 Fed. 396, *affirming* 24 Fed. 922.

46. Railway Co. *v.* Kempton, 138 Fed. 792, (C. C. A.).

47. Railroad Co. *v.* Gardiner, 51 Neb. 70, 70 N. W. Rep. 508; Rail-

the rule that when the contract contravenes the settled policy of the laws of the state where it is sought to be enforced, its terms will not be upheld even though valid where made.[48] It is doubtful whether that position can be sustained in view of an earlier well-reasoned decision of the Supreme Court of Texas.[49] It is to be hoped that the latter court will adhere to its own position which rests upon the true principles of Conflict of Laws.

In Kentucky and Pennsylvania, as we have seen, the erroneous doctrine prevails that the creation of the rights of the parties is governed by the law of the place where the breach occurs.[50] But the law of the place where the breach occurs will be enforced in those states even when a stipulation as to the carrier's liability is invalid by their own laws, if it is valid by the laws of the place where the breach occurs.

From this resumé, it will be seen that decisions of the United States courts, the courts of Nebraska, Kentucky and Pennsylvania and the Texas Court of Civil Appeals rest on such exceptional principles that they should not be taken as conclusive authority by other courts in the determination of questions of the Conflict of Laws in respect of contracts of affreightment containing limitations of the carrier's liability. The remaining cases in the various state courts can easily be classified under the principles contained in the following eight sections, having regard to the fact that although the forum may be the same as the place of contract or destination, the principles remain the same as if it were separate and distinct.

Sec. 216. Enforcement of limitation valid at place of contract, valid at destination and valid at forum.—Where a stipulation as to limitation of the carrier's liability would be valid by the law of the place of contract, valid by the law of the

road Co. *v.* Kennard Glass & Paint Co., 59 Neb. 435, 81 N. W. Rep. 372; Wabash R. Co. *v.* Sharpe, —— Neb. ——, 107 N. W. Rep. 758.

48. Railway Co. *v.* McIntyre, (Tex. Civ. App.) 82 S. W. Rep. 346.

49. Ryan *v.* Railroad Co., 65 Tex. 13, 57 Am. Rep. 583.

50. Hughes *v.* Pennsylvania R. Co., 202 Pa. 222, 51 Atl. Rep. 990, 97 Am. St. Rep. 713, 63 L. R. A. 513; Railway Co. *v.* Druien, 26 Ky. L. Rep. 103, 80 S. W. Rep. 778, 66 L. R. A. 275.

place of destination, and valid by the law of the forum, the ordinary presumption that the law of the place of contract applies will govern, and the rights created by that law will be enforced by the courts of the forum, unless a clear intention of the parties is shown to the contrary.[1]

Sec. 217. Enforcement of limitation valid at place of contract, invalid at destination and valid at forum.—Where a stipulation as to limitation of the carrier's liability would be valid by the law of the place of contract, invalid by the law of the place of destination, and valid by the law of the forum, the law of the place of contract should apply in the absence of overwhelming evidence to the contrary. Two legal presumptions are applicable here: first, that the law of the place of contract should apply in the absence of evidence of the intention of the parties to the contrary, and second, that the parties intended to make a valid contract. Both presumptions favor the law of the place of contract. Evidence to overcome them should be clear and convincing.[2]

Sec. 218. Enforcement of limitation valid at place of contract, invalid at destination, and invalid at forum.—Where a

1. In Robertson *v.* National Steamship Co., 1 App. Div. 61, 37 N. Y. Supp. 69, 72 N. Y. St. Rep. 223, the provisions of the contract were valid by the laws of France, the place of contract, and valid by the laws of New York, the place of destination and the forum. The bill of lading, made in France, provided for the transportation of goods from Havre, France, to London, and from London to New York. The goods were injured between Havre and London. The court held that the contract was not governed by the law of England, as it was made and to be performed outside of England.

In Otis *v.* Railway, 112 Mo. 622, 20 S. W. Rep. 676, the stipulation in the contract was valid by the laws of Texas, since the Texas statute prohibiting limitations of liability does not apply to interstate shipments. The stipulation was also valid under the laws of Massachusetts, the place of destination, and of Missouri, the forum. The court held that the laws of Texas would apply, and being an interstate shipment, the stipulation was valid and enforceable.

See also Railroad *v.* Ware, (Tex. Civ. App.) 60 S. W. Rep. 343.

2. See cases cited under succeeding section. If the holdings in them are correct, this view must necessarily be correct.

stipulation as to limitation of the carrier's liability would be valid by the law of the place of contract, invalid by the law of the place of destination and invalid by the law of the forum, the law of the place of contract should apply in the absence of overwhelming evidence to the contrary and the stipulation should be enforced by the courts of the forum. Both presumptions mentioned in the preceeding sections also apply here with equal force.[3]

Sec. 219. Enforcement of limitation valid at place of contract, valid at destination, and invalid at forum.—Where a stipulation as to limitation of the carrier's liability is valid by

3. In Western R. R. Co. *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. Rep. 916, 2 L. R. A. 102, a stipulation was valid by the law of Massachusetts, the place of contract, and invalid by the law of Georgia, the place of destination and the forum. The law of Massachusetts was applied, and the stipulation forced.

In Talbott *v.* Merchants' Dispatch Transp. Co., 41 Iowa 247, 20 Am. Rep. 589, a stipulation was valid by the laws of Connecticut, the place of contract, and invalid by the law of Iowa, the place of destination and the forum. The stipulation was upheld.

In Hazel *v.* Railroad Co., 82 Iowa 477, 48 N. W. Rep. 926, a stipulation was valid by the law of the then territory of Dakota, and invalid by the law of Iowa, the place of destination and the forum. The stipulation was held enforceable.

In O'Regan *v.* Steamship Co., 160 Mass. 356, 35 N. E. Rep. 1070, 39 Am. St. Rep. 484, a stipulation was valid by the law of Ireland, the place of contract, and invalid by the law of Massachusetts, the place of destination and the forum. The stipulation was held enforceable.

In Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, 27 N. E. Rep. 665, a stipulation was valid by the law of England, the place of contract, and invalid by the law of Massachusetts, the place of destination and the forum. The stipulation was held enforceable.

In Ryan *v.* Railroad Co., 65 Tex. 13, 57 Am. Rep. 583, a stipulation was valid by the law of Missouri, the place of contract and invalid by the law of Texas, the place of destination and the forum. The stipulation was held enforceable. But see Railway *v.* McIntyre (Tex. Civ. App), 82 S. W. Rep. 346.

Under the peculiar views of the courts of Nebraska and Kentucky, such stipulations, of course, have been held unenforceable. Railroad Co. *v.* Gardiner, 51 Neb. 70, 70 N. W. Rep. 508; Railroad Co. *v.* Kennard Glass & Paint Co., 81 N. W. Rep. 372, 59 Neb. 435; Express Co. *v* Walker, 26 Ky. L. Rep. 1025, 83 S. W. Rep. 106; Wabash R. Co. *v.* Sharpe, —— Neb. ——, 107 N. W. Rep. 758.

the law of the place of contract, valid by the law of the place of destination, and invalid by the law of the forum, the ordinary presumption that the law of the place of contract applies would govern, and that law will be enforced unless a clear intention of the parties is shown to the contrary.[4]

Sec. 220. Enforcement of limitation invalid at place of contract, valid at destination, and valid at forum.—Where a stipulation as to limitation of liability would be invalid by the law of the place of contract, valid by the law of the place of destination and valid by the law of the forum, the two presumptions that the law of the place of contract should apply in the absence of evidence of the intention of the parties to the contrary and that the parties intended to make a valid contract counterbalance each other. The court should rest its decision, therefore, entirely on extrinsic evidence such as has already been suggested,[5] and such a stipulation would necessarily be held invalid in some cases and valid in others, depending on the evidence.[6]

4. In Knowlton *v.* Railroad, 19 Ohio St. 260, 2 Am. Rep. 395, a stipulation was valid by the law of New York, the place of contract and also destination, and invalid by the law of Ohio, the forum. The stipulation was held enforceable.

This rule would also govern in Kentucky. Tecumseh Mills *v.* Railroad, 108 Ky. 572, 22 Ky. L. Rep. 264, 57 S. W. Rep. 9, 49 L. R. A. 557.

5. See *ante*, sec. 214.

6. Extrinsic evidence was resorted to in *In re* Missouri Steamship Co., 42 Ch. D. 321. In that case the stipulation in question was invalid by the law of Massachusetts, the place of contract, and valid by the law of England, the place of destination and the forum. The stipulation was held enforceable. The court unanimously found in the facts that the ship was English, that her owners were English, that England was the destination of the goods, that the bill of lading was in the English form, and that the contract was such as the English law approved, conclusive evidence that the parties had the English law in view.

Extrinsic evidence was also resorted to in Grand *v.* Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490, *affirmed*, 158 N. Y. 688, 53 N. E. Rep. 1125. In that case, a stipulation was invalid by the law of Massachusetts, the place of contract, and valid by the law of New York, the place of destination and the forum. The stipulation was held invalid.

See also Railroad *v.* Beebe, 174 Ill. 13, 50 N. E. Rep. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253, *affirming* 69 Ill. App. 363. (Stipulation held invalid according to Iowa law

Sec. 221. Enforcement of limitation invalid at place of contract, invalid at destination and valid at forum.—Where a stipulation as to limitation of the carrier's liability would be invalid by the law of the place of contract, invalid by the law of the place of destination, and valid by the law of the forum, there can be no question about its enforcement. The court of the forum would always hold the stipulation invalid and unenforceable.

Sec. 222. Enforcement of limitation invalid at place of contract, valid at destination, and invalid at forum.—Where a stipulation as to limitation of the carrier's liability would be invalid by the law of the place of contract, valid by the law of the place of destination, and invalid by the law of the forum, the two presumptions that the law of the place of contract should apply in the absence of evidence of the intention of the parties to the contrary and that the parties intended to make a valid contract, counterbalance each other. The court of the forum should rest its decision, therefore, entirely on extrinsic evidence such as has already been suggested,[7] and such a stipulation would necessarily be held invalid in some cases and valid in others, depending on the evidence.[8]

Sec. 223. Enforcement of limitation invalid at place of contract, invalid at destination and invalid at forum.—Where a

which governed); Barnes *v.* Railroad Co., 93 N. Y. Supp. 616. (Kentucky law held applicable and stipulation void); Brockway *v.* Express Co., 171 Mass. 158, 50 N. E. Rep. 626; *s. c.* 168 Mass. 257, 47 N. E. Rep. 87. (Place of contract, Illinois, where stipulation would be invalid, destination New York, where it would be valid, forum Massachusetts. Illinois law applied.)

7. See *ante*, sec. 214.

8. In McDaniel *v.* Railway Co., 24 Iowa 412, a stipulation was invalid in Iowa, the place of contract, valid in Illinois, the place of destination, and invalid in Iowa, the forum. The stipulation was held invalid.

See also Davis *v.* Railroad Co., 93 Wis. 470, 67 N. W. Rep. 16, 33 L. R. A. 654, 57 Am. St. Rep. 935. (Held invalid.)

In Kentucky, as the courts held the contract divisible, if any of the performance is to be had in Kentucky, and the contract is made in Kentucky, the stipulation against the carrier's liability will be held invalid. Railroad Co. *v.* Taber, 98 Ky. 503, 36 S. W. Rep. 18, 34 L. R. A. 685.

stipulation as to limitation of the carrier's liability would be invalid by the law of the place of contract, invalid by the law of the place of destination and invalid by the law of the forum, it certainly could not be enforced.

Sec. 224. Proof must be made of what foreign law is.—In all the cases above-mentioned proof must be made in the court of the forum of what the foreign law is. In the absence of such proof of the foreign law the same rule governs as in the case of stipulations other than those limiting the carrier's liability.[9]

9. See *ante*, sec. 207.

CHAPTER V.

OF CONNECTING CARRIERS.

§ 225. In general.
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229. This rule well settled in England.
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236. Even under contract for through carriage intermediate carrier who causes injury may be held liable.
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243. No liability for loss beyond his own line under contract to carry to end of line and there to deliver to next carrier.
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251. Same subject—Actual partnership not necessary.
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253. Same subject.
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260. Same subject.

§ 261. Same subject.
262. Same subject—Effect of establishing joint or through rates.
§ 263. Same subject — The rule stated.
264. Partnerships between corporations as carriers.

Sec. 225. (§ 145.) In general.—Carriers may frequently become merely forwarders when the goods are consigned to points beyond the termini of their own lines; and it frequently becomes difficult to determine whether, under the particular circumstances of the case, they should be held liable for the safety of the goods throughout the whole line of transit to destination, though extending beyond the termination of their routes; or whether having transported them as far as their routes extend and there having safely delivered them to another connecting carrier to complete the transportation they are not to be considered as having acted as forwarding agents merely as to such further carriage and therefore no longer responsible.

Sec. 226. Carrier not bound to assume liability beyond terminus of his own line.—While the carrier cannot refuse to accept and carry the goods to the terminus of his own line and there deliver them to a connecting carrier with whom he has an established connection,[1] he is not bound by law to assume responsibility for their safe carriage further than the terminus of his own line, and if in any case, therefore, he is to become liable as a common carrier beyond such terminus, his liability must be based upon some further obligation than that created by law.[2] It is well settled, however, that the carrier may contract to carry to a point beyond the terminus of his own line so as to be liable for the delivery at such point, and that the liability thus attaching at the commencement will continue throughout the whole transit.[3] And when he has thus undertaken for the transporta-

1. Inman *v.* Railroad Co., 14 Tex. Civ. App. 39, 37 S. W. Rep. 37; Seasongood *v.* Transportation Co., 21 Ky. Law Rep. 1142, 54 S. W. Rep. 193, 49 L. R. A. 270.

2. See Miller, etc., Elevator Co. *v.* Railway Co., 138 Mo. 658, 40 S. W. Rep. 894, citing Hutchinson on Carr; Post *v.* Railway Co., 103 Tenn. 184, 52 S. W. Rep. 301, 55 L. R. A. 481, 16 Am. & Eng. Rd. Cas. (N. S.) 201; Griffith *v.* Railway Co., —— Mo. App. ——, 90 S. W. Rep. 408.

3. Railway Co. *v.* Reiss, 183 U. S. 621; *s. c.* 98 Fed. 533, 39 C. C.

tion of the goods throughout to destination, all connecting lines of carriers employed in furthering and completing such transportation become his agents, for whose defaults he becomes responsible to the owner of the goods.[4]

Sec. 227. (§ 145a.) What circumstances necessary to show contract by carrier to assume liability beyond his own line.— The liability of the carrier beyond the terminus of his own line being thus based upon contract, it is evident that a contract to that effect, either express or implied, must be shown to exist.[5] But what shall be considered sufficient to constitute a contract on the part of the carrier to carry the goods to the destination to

A. 149; *s. c.* 99 Fed. 1006, 39 C. C. A. 679; Railway Co. *v.* Woodward, 164 Ind. 360, 72 N. E. Rep 558; *s. c.* 73 N. E. Rep. 810; Hoffman *v.* Railroad Co., 85 Md. 391, 37 Atl. Rep. 214; Hubbard *v.* Railroad Co., 112 Mo. App. 459, 87 S. W. Rep. 52, citing Hutchinson on Carr; Palmer *v.* Railroad Co., 101 Cal. 187, 35 Pac. Rep. 630, citing Hutchinson on Carr; Germania Fruit Co. *v.* Railroad Co., 133 Cal. 426, 65 Pac. Rep. 948; Railroad Co. *v.* Georgia, etc., Exchange, 91 Ga. 389, 17 S. E. Rep. 904; Railway Co. *v.* Sharp, 64 Ark. 115. 40 S. W. Rep. 781, citing Hutchinson on Carr; Page *v.* Railway Co., 7 S. Dak. 297, 64 N. W. Rep. 137; Nichols *v.* Railroad Co., 24 Utah, 83, 66 Pac. Rep. 768, 91 Am St. Rep. 778; Saltsman *v.* Railroad Co., 65 Hun, 448, 20 N. Y. Supp. 361; Thompson *v.* Railway Co., 11 Tex. Civ. App. 145, 32 S. W. Rep. 427; Railway Co. *v.* Leatherwood, 29 Tex. Civ. App. 507, 69 S. W. Rep. 119; Railway Co. *v.* McCarthy, 29 Tex. Civ. App. 616, 69 S. W. Rep. 229; Merchants, etc., Co. *v.* Hately, (Canada) 14 S. C. R. 572; Railway Co. *v.* McMillan, (Canada) 16 S. C. R. 543; E. Tenn., etc., R. R. *v.* Nelson, 1 Cold. 276; Steamboat Co. *v.* Brown 54 Penn. St. 77; Noyes *v.* The R. R. Co., 27 Vt. 110; Peet *v.* The Railway, 19 Wis. 118; Wahl *v.* Holt, 26 *id.* 703; Root *v.* G. W. R. R., 45 N. Y. 524; Condict *v.* G. T. Railway, 4 Lans. 106; Bryan *v.* M. & P. R. R., 11 Bush, 597; Southern Express Co. *v.* Shea, 38 Ga. 519; Penn. R. R. *v.* Berry, 68 Penn. St. 272; Ill. Cen. R. R. *v.* Copeland, 24 Ill. 332; Ill. Cen. R. R. *v.* Johnson, 34 *id.* 389; St. Louis, etc., R. R. *v.* Piper, 13 Kan. 505; Quimby *v.* Vanderbilt, 17 N. Y. 306; Williams *v.* Vanderbilt, 28 *id.* 217; Roberts *v.* Van Buskirk, 31 N. Y. 661; Newell *v.* Smith, 49 Vt. 255.

4. See, Virginia Coal & Iron Co. *v.* Railroad Co., 98 Va. 776, 37 S. E. Rep. 310, citing Hutchinson on Carr.

5. See Gray *v.* Jackson, 51 N. H. 9; Piedmont Mfg. Co. *v.* Railroad Co., 19 S. C. 353; Railroad Co. *v.* Washington, —— Ark. ——, 69 L R. A. 65, 85 S. W. Rep. 406, citing Hutchinson on Carr.

which they may be directed beyond his own route is a question which has been differently determined by different courts upon two distinct theories as to the obligation of the carrier in this regard.

Sec. 228. (§ 146.) The rule of Muschamp's Case.—It has long been the established law of England that when the carrier accepts for carriage goods directed to a destination beyond his own route, he assumes, by the very act of acceptance, in the absence of any express contract upon the subject, the obligation to transport them to the place to which they may be directed. This was first decided there in the noted case of Muschamp *v.* The Lancaster & Preston Junction Railway.[6] A box was delivered to the carrier and booked by his agent for a point not on his line and which could only be reached by another connecting company, which fact was known to the shipper. The freight was not paid in advance, the agent saying that it would better be left to be paid by the consignee on its arrival at its destination. There was no further contract and no proof of any partnership between the connecting companies. The box having been lost after it had been forwarded by the defendant upon the connecting line, the question was whether the defendant was liable. The case was tried by a jury, and Baron Rolfe, in summing up, stated that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence[7] of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied although that place were beyond the limits within which he in general professed to carry on his trade of a carrier. The jury found for the plaintiff. A motion was made for a new trial on the ground of misdirection, and the motion was denied. The whole matter, said the court, was a question for the jury, to determine what the contract was on the evidence before them;

6. 8. M. & W. 421.

7. See the learned exposition of Doe, J., upon the meaning of this phrase when used by English judges, in Gray *v.* Jackson, 51 N. H. 9, 14, where all the English and American cases to 1871 are cited and collated.

and it was held that there had been no misdirection, as the facts shown constituted evidence from which the jury might infer that the carrier had undertaken to carry the goods safely to their destination. In connection with this case it is to be noted that there was no written contract to be construed by the court; that the contract was to be gathered from the circumstances, and that it was a question for the jury to determine from these circumstances what the contract was. The court went no further than to affirm that from such circumstances as those there existing a contract for through carriage might be inferred, or, as the learned judge expressed it, that these facts constituted *prima facie* evidence of such a contract.

Sec. 229. (§ 147.) This rule well settled in England.—This rule that such a contract is to be inferred from these circumstances has been ever since adhered to without question or dispute by the English courts, and no principle is better settled in that country than that which obliges the carrier, who so accepts goods for transportation the destination of which is one to which he himself does not carry because off or beyond his own route, to nevertheless take upon himself the responsibility for both the carriage and the safety of the goods to destination; and if they be lost upon the route, no matter by whom, he becomes liable to the owner for the loss, unless he has protected himself against such liability by contract.[8] And not only does the first or contracting carrier become liable, no matter by whom the goods may be lost, but it becomes exclusively responsible and can alone be sued by the aggrieved party; and any attempt to hold the subsequent or connecting carrier liable for the loss, although it may have occured from its negligence or fault, must fail for the want of privity of contract between such carrier and the injured party.[9]

8. Scothorn *v.* The Railway, 8 Exch. 341; Crouch *v.* The Railway, 2 Hurl. & N. 491; 3 id. 383; Wilby *v.* The Railway, 2 id. 703; Watson *v.* Railway, 15 Jur. 448; Webber *v.* Railway, 3 H. & C. 771.

9. Collins *v.* The Railway, 11 Exch. 790; Coxon *v.* The Railway, 5 Hurl. & N. 274; Mytton *v.* The Railway, 4 id. 615.

Sec. 230. (§ 148.) English rule prevails in many states.—Upon the question of the justice and policy of this rule the American courts are divided. A number of them have emphatically approved and adopted it, and hold that the acceptance of the goods, in the absence of express contract, implies an undertaking on the part of the carrier to transport them as consigned or directed, although it may be to a place to which the carrier himself does not carry, and puts upon him the responsibility to the end of the transit, no matter how many subsidiary lines it may be necessary to employ to complete it.[10]

10. *Alabama:* Mobile, etc., R. Co. *v.* Copeland, 63 Ala. 219; Louisville, etc., R. Co. *v.* Meyer, 78 Ala. 597; Southern, etc., R'y. Co. *v.* Levy, —— Ala. ——, 39 So. Rep. 95.

Arkansas: Railroad Co. *v.* Washington, —— Ark. ——, 85 S. W. Rep. 406; Railway Co. *v.* Record, —— Ark. ——, 85 S. W. Rep. 421.

Georgia: Falvey v. Railroad Co., 76 Ga. 597; Atlanta, etc., R. Co. *v.* Texas Grate Co., 81 Ga. 602; Mosher *v.* The So. Ex. Co., 38 Ga. 37; Southern Ex. Co. *v.* Shea, 38 Ga. 519.

Illinois: Ohio, etc. R. Co. *v.* Emrich, 24 Ill. App. 245; Wabash, etc. R'y Co. *v.* Jaggerman, 115 Ill. 407; Ill. Cen. R. R. *v.* Copeland, 24 Ill. 332; Ill. Cen. R. R. *v.* Johnson, 34 *id.* 389; Ill. Cen. R. R. *v.* Frankenberg, 54 *id.* 88; U. S. Express Co. *v.* Haines, 67 *id.* 137; Chicago, etc. R. R. *v.* The People, 56 *id.* 365; Erie R. R. *v.* Wilcox, Ill. Sup. Ct., Chicago L. News, 9, 178; Adams Ex. Co. *v.* Wilson, 81 Ill. 339; Wabash R. Co. *v.* Harris, 55 Ill. App. 159; Transportation Co. *v.* Flour Mills Co., 92 Ill. App. 628; Railroad Co. *v.* Simon, 160 Ill. 648, 43 N. E. Rep. 596, *affirming* 57 Ill. App. 502; Railroad Co. *v.* Carter, 165 Ill. 570, 46 N. E. Rep. 374, 36 L. R. A. 527, *reversing* 62 Ill. App. 618; Railway Co. *v.* Elgin Condensed Milk Co., 175 Ill. 557, 51 N. E. Rep. 911, 67 Am. St. Rep. 238, *affirming* 74 Ill. App. 619; Elgin, etc. Ry. Co. *v.* Bates Machine Co., 200 Ill. 636, 66 N. E. Rep. 326, 93 Am. St. Rep. 218, *affirming* 98 Ill. App. 311.

Missouri: Halliday *v.* Railway Co., 74 Mo. 159; Marshall *v.* Railway Co., 74 Mo. App. 81. See also Crouch *v.* Railroad Co., 42 Mo. App. 248.

New York: Weed *v.* The Railroad, 19 Wend. 534.

Ohio: Baltimore, etc. R. Co. *v.* Campbell, 36 Ohio, 647.

S. Carolina: Bradford *v.* The Railroad, 7 Rich. 201; Kyle *v.* The Railroad, 10 *id.* 382.

Tennessee: Carter *v.* Peck, 4 Sneed, 203; Western & At. R. R. *v.* McElwee, 6 Heisk. 208; E. Tenn. & Va. R. R. *v.* Rogers, 6 *id.* 143; Louisville, etc. R. R. Co. *v.* Campbell, 7 *id.* 253.

Washington: Allen *v.* Railway Co., —— Wash. —— 84 Pac. Rep. 620.

Wisconsin: Hansen *v.* Railroad Co., 73 Wis. 346. In many of

Sec. 231. (§ 149.) English rule denied in majority of states. —On the other hand, the majority of our courts have pronounced with equal emphasis against the rule as unjust to the carrier, and

these cases, however, the contract creating the liability was express. See *post*, 232.

The case of Lock Company *v.* The Railroad, 48 N. H. 339, recognizes and indorses Muschamp's Case to the fullest extent (though it might have been put on other grounds, as there was practically a partnership between the connecting lines), and *arguendo* the court said: "The use of steam in carrying goods and passengers has produced a great revolution in the whole business. The amount and importance of it have of late vastly increased and are every day increasing. The large business between the different parts of the country is done by parties who are associated in long continuous lines, receiving one fare through and dividing it among themselves by mutual agreement. They act together for all practical purposes, so far as their own interests are concerned, as one united and joint association. In managing and controlling the business on their lines, they have all the advantages that could be derived from a legal partnership. They make such arrangements among themselves as they see fit for sharing the losses as they do the profits that happen on any part of their route. If by their agreement each party to their connected line is to make good the losses that happen on his part of the route, the associated carriers and not the owner of the goods have the means of ascertaining where the losses have happened. And if this cannot be known, there is nothing unreasonable or inconsistent in their sharing the losses, as in the case of a legal partnership, in proportion to their respective interests in the whole route. What then is the situation of the owner whose goods have been damaged or lost on a continuous line of three or any larger number of associated carriers, if he can look only to the carrier on whose part of the route the damages have happened? In the first place, he must set about learning where his loss happened. This would be difficult and often impossible. . . . He would have no means of learning himself; and he would not, unless of a very confiding disposition, rely on any very zealous aid in his search from the different carriers associated in the connected line. And if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy under the rule set up by these defendants."

In The Illinois Central Railroad *v.* Frankenberg, 54 Ill. 88, the supreme court of Illinois, by C. J. Breese, made use of the following language upon the subject of the adoption of the rule in Muschamp's Case:

as unnecessary upon any grounds of public policy, and have held that, in the absence of any other contract than such as is generally to be implied from the acceptance of the goods for carriage, the obligation of the carrier extends only to the transportation to the end of his route and a delivery there to the next succeeding

"So long ago as 1860 this court, in the case of this same company against Copeland, 24 Ill. 332, expressed a decided partiality for the rule in Muschamp's Case, 8 Mees. & Wels. 421, so much relied on by the appellee, and in which case all the authorities, both English and American, were fully examined, and we said, though this point was not in the case, we were inclined to yield to the force of the reasoning of the English courts on principles of public convenience, if no other, and to hold when a carrier receives goods to carry, marked to a particular place, he is *prima facie* bound to carry and deliver at that place. By accepting the goods so marked he impliedly agrees so to do, and he ought to be answerable for the loss.

"Again, in the case of the same company against Johnson, 34 *id.* 389, there was an express understanding to transport the goods to Wheeling, but the court, referring to Copeland's Case, *supra*, considered that case as holding that a carrier who receives goods to carry, marked to a particular place, was bound to carry to and deliver at that place—that it was on an agreement implied from the mark or direction on the goods, and accepting them so marked that the liability arose.

"Now, on the point of public convenience, which consideration had great weight with us in determining which rule should be adopted, it seems to us that consignors of the productions of our country or other property by railroad should not be required in case of loss or damage, to look for remuneration to any other party than the one to which they delivered the goods. It would be a great hardship, indeed, to compel the consignor of a few barrels of flour delivered to a railroad in this state, marked to New York city, and which are lost in the transit, to go to New York, or to the intermediate lines of road, and spend days and weeks, perhaps, in endeavors to find out on what particular road the loss happened, and, having ascertained it, in the event of a refusal to adjust the loss, to bring a suit in the court of New York for his damages. Far more just would it be to hold the company who received the goods in the first instance as the responsible party, and the intermediate roads its agents to carry and deliver; and it is the most reasonable and just, for all railroads have facilities not possessed by a consignor of tracing losses of property conveyed by them, and all have, or can have, running connections with each other. Above all, when it is considered the receiving company can, at the outset, relieve itself from its common-law liability by a special and definite agreement, such a rule cannot prejudice them. The rule

carrier to further or complete the transportation. In order to be bound further there must be a positive agreement, either express or implied, extending the liability,[11] and the burden of proof will

being known, all parties can readily accommodate their business to it, and no inconvenience can result to any one from its operation." A contract exempting the carrier from liability was, however, enforced.

11. See *United States:* Railroad Co. *v.* The Manuf. Co., 16 Wall. 318; Railroad Co. *v.* Pratt, 22 *id.* 123; Myrick *v.* Railroad Co., 107 U. S. 102; Stewart *v.* Railroad Co., 1 McCrary, 312; Railway *v.* Fairbanks & Co., 90 Fed. 467, 33 C. C. A. 611; Railroad Co., *v.* Jones, 155 U. S. 333, 15 Sup. Ct. R. 136.

California: Cavallaro *v.* Railway Co., 110 Cal. 348, 42 Pac. Rep. 918, 52 Am. St. Rep. 918, citing Hutchinson on Carr. See also, Pereira *v.* Railroad Co., 66 Cal. 92.

Connecticut: Hood *v.* The Railroad, 22 Conn. 502; Elmore *v.* The Railroad, 23 Conn. 457.

Florida: Savannah, etc. R'y Co. *v.* Harris, 26 Fla. 148, 7 So. Rep. 544. See also, Bennett *v.* Filyaw, 1 Fla. 403.

Indiana: Railway Co. *v.* Bryant, —— Ind. App. —, 75 N. E. Rep. 829.

Iowa: Hill *v.* Railroad Co., 60 Iowa, 196; Hartley *v.* Railroad Co., 115 Iowa, 612, 89 N. W. 88; Angle *v.* Railroad Co., 9 Iowa, 487; Mulligan *v.* Railway Co., 36 Iowa, 181.

Kansas: Berg *v.* Railroad Co., 30 Kan. 561.

Kentucky: Railroad Co. *v.* Crozier, 13 Ky. Law Rep. 175; Railway Co. *v.* Foster, 13 *id.* 637; Railroad Co. *v.* Cooper, 19 Ky. Law Rep. 1152, 42 S. W. Rep. 1134; Thomas *v.* Railway Co., 25 Ky. Law Rep. 1051, 76 S. W. Rep. 1093.

Louisiana: Vincent & Hayne, 114 La. 1021, 38 So. Rep. 816.

Maryland: Balt. & O. R. R. *v.* Schumaker, 29 Md. 176; Hoffman *v.* Railroad Co., 85 Md. 391, 37 Atl. Rep. 214.

Maine: Perkins *v.* The Railroad, 47 Me. 589; Skinner *v.* Hall, 60 *id.* 477; Plantation *v.* Hall, 61 *id.* 517.

Massachusetts: Nutting *v.* The Railroad, 1 Gray, 502; Darling *v.* The Railroad, 11 Allen, 295; Burroughs *v.* The Railroad, 100 Mass. 26.

Michigan: McMillán *v.* The Railroad, 16 Mich. 120; Detroit, etc. R'y *v.* McKenzie, 43 Mich. 609; Rickerson, etc. Co. *v.* Railroad Co., 67 Mich. 110; Smith *v.* Express Co., 108 Mich. 572, 66 N. W. Rep. 479.

Minnesota: Irish *v.* The Railroad, 19 Minn. 376.

Mississippi: Crawford *v.* The R. R. Association, 51 Miss. 222.

New Hampshire: Gray *v.* Jackson, 51 N. H. 9.

New York: Van Santvoord *v.* St. John, 6 Hill, 158; Condict *v.* The Railroad, 54 N. Y. 502; Root *v.* The Railroad, 45 *id.* 524; Klein *v.* Dunlop, 16 Misc. Rep. 34, 37 N. Y. Supp. 947; Bishawaiti *v.* Railroad Co., 92 N. Y. Supp. 783; Soviero *v.* Express Co., 94 N. Y. Supp. 375.

North Carolina: Phillips *v.* The Railroad, 78 N. C. 294; Knott *v.* Railroad Co., 98 N. Car. 73; Mere-

dith *v.* Railway, 137 N. Car. 478, 50 S. E. Rep. 1, citing Hutchinson on Carr.

Oklahoma: Church *v.* Railroad Co., 1 Okl. 44, 29 Pac. Rep. 530.

Oregon: Taffee *v.* Railroad Co., 41 Or. 64, 67 Pac. Rep. 1015, 58 L. R. A. 187, citing Hutchinson on Carr.

Pennsylvania: Camden, etc. R. R. *v.* Forsyth, 61 Penn. St. 81; Clyde *v.* Hubbard, 88 Penn. St. 358; Kellar *v.* Railway Co., 196 Pa. St. 57, 46 Atl. Rep. 261.

Rhode Island: Harris *v.* Railway Co., 15 R. I. 371; Knight *v.* Railroad Co., 13 R. I. 572.

Texas: Hunter *v.* Railway Co., 76 Tex. 195; Railway Co. *v.* Gallagher, (Tex. Civ. App.) 64 S. W. Rep. 809, citing Hutchinson on Carr.; Gulf, etc. R'y Co. *v.* Jackson & Edwards, —— Tex. ——, 89 S. W. Rep. 968, *reversing* (Tex. Civ. App.) 86 S. W. Rep. 47.

Vermont: Farmers & M. Bank *v.* The Trans. Co., 23 Vt. 186; Brintnall *v.* The Railroad, 32 Vt. 665; Hadd *v.* Express Co., 52 Vt. 335.

Virginia: McConnell *v.* Railroad Co., 86 Va. 248, 9 S. E. Rep. 1006.

In a number of these cases, however, the point was not involved or there was an express exemption from liability. See § 232.

Nutting *v.* The Connecticut River Railroad may, perhaps, be considered as the leading case in opposition to the English rule. The receipt for the goods, so far as material to the question of liability, was, "Received of E. Nutting for transportation to New York." The proof was that the defendant company's line extended only part of the distance, and that it was necessary for it to transfer its freight for New York to another line, which it did in this instance, taking a receipt for it from the connecting carrier. It was further admitted that the defendant company was paid for the carriage only to the end of its own line and that there was no connection in business between the two lines. In giving the judgment of the court, Metcalf, J., said: "In our judgment the obligation is nothing more than to transport the goods safely to the end of their road and there deliver them to the proper carriers to be forwarded towards their ultimate destination. . . . But the plaintiff seeks to charge the defendant on the receipt given by Clarke, their agent, as on a special contract that the boxes should be safely carried the whole distance between Northampton and New York. We cannot so construe the receipt. It merely states the fact that the boxes had been received for transportation to New York; and the plaintiff might have proved that fact, with the same legal consequences to the defendant, by oral testimony, if he had not taken the receipt. The receipt in our opinion imposed on defendant no further obligation than the law imposed without it." And in reference to the rule as laid down in Muschamp *v.* The Railway, which was urged upon the court, he went on to say: "We cannot concur in that view of the law, and we are sustained in our dissent from it by the court of errors of New York and by the supreme courts of Vermont and Connecticut."

be upon the shipper to prove that such an agreement was made.[12] And this is frequently called the American rule, in distinction to that of the English courts.

Sec. 232. (§ 149a.) Further of this rule.—This conflict in the cases respecting the rule of Muschamp's Case seems, however, to be more apparent than real, and to be based in many instances upon an entire misapprehension of the true effect of the decision in that case.[13] In many of the American cases in which it is referred to, it was wholly foreign to the issue, inasmuch as the contract involved in those cases, whether imposing or excluding the liability, was in writing and clearly express, while in Muschamp's Case the contract was neither in writing nor express, but was wholly implied from circumstances.[14] Cases of

12. Taylor *v.* Railroad Co., 87 Me. 299, 32 Atl. Rep. 905.

13. In Gray *v.* Jackson, 51 N. H. 9, 34, Doe, J., after reviewing substantially all of the English and American cases down to that date (1871), says: "These are some of the principal American cases usually cited on the question of the liability of a carrier beyond his own route, in the absence of an express written contract. Some of them are not in point. Many contain nothing but *dicta* on the subject. Some turn on writings held to be, or treated as, express contracts, the construction of which by the court show the understanding of the parties, without the finding of a jury on parol or circumstantial evidence. Some are based on the mistake of supposing that in Muschamp's Case the defendants were held liable by the court as a matter of law. Some are controlled or influenced by the mistake of supposing that in Muschamp's Case the opinions of the judges on the *prima facie* weight of the evidence were opinions on the law. It would seem that in no one of them has the question been to be, or been treated as, a question of law, where it was claimed to be a question of fact or where the attention of the court was called to the distinction between law and fact,—a distinction which has been clouded by misapprehensions of Muschamp's Case. In nearly all of them, when there is no decisive contract in writing, it is held to be, or practically treated as, a question of fact. There is much in the American authorities going strongly to show that Lord Abinger was right, and there is nothing in them having any considerable tendency to show that he was wrong when he said, in Muschamp's Case, 'The whole matter is therefore a question for the jury, to determine what the contract was, on the evidence before them.'"

14. How true this is can be best determined by a careful examination of the cases cited in the two preceding sections, but of the

this nature should and doubtless would have been decided in the same way in any of the states.

The rule in Muschamp's Case has also been regarded in many of the American cases as constituting a part of the common law in the same manner as the rule fixing the carrier's liability as an insurer, and, like that liability, placed beyond the reach of contracts limiting the responsibility for negligence.[15] But this it clearly is not. The whole liability of the carrier beyond his own line is based upon contract, express or implied, and unless such a contract appears there is no liability[16] *A fortiori* is there no such liability where there is not only no implied contract creating it but an express contract excluding it.[17]

"There is really no great difference," said the court in the case of Piedmont Manufacturing Company *v.* The Railroad,[18] between the English and American doctrine on this subject. The one holds that to exempt a carrier from liability beyond its terminus there must be a special contract to that end. The other, that to make the first carrier responsible there must be a special contract to that end. Both admit that the carrier is not bound to go beyond the terminus, but that he may do so; and if he undertakes to do so he is bound by his undertaking. In the one

cases in which there was an express exemption, the cases of Hunter *v.* Railway Co., 76 Tex. 195; McConnell *v.* Railroad Co., 86 Va. 248, 9 S. E. Rep. 1006; Ortt *v.* Railway Co., 36 Minn. 396; Berg *v.* Railroad Co., 30 Kan. 561; Harris v. Railway Co., 15 R. I. 371; Myrick *v.* Railroad Co., 107 U. S. 102, will furnish illustrations, while of the other class such cases as Falvey *v.* Railroad Co., 76 Ga. 597; Hansen *v.* Railroad Co., 73 Wis. 346; Mobile, etc. Railroad Co. *v.* Copeland, 63 Ala. 219, are examples.

15. See Condict *v.* Railroad Co., 54 N. Y. 501.

16. See Berg *v.* Railroad Co., 30 Kan. 561; Cincinnati, etc. R. R. Co. *v.* Pontius, 19 Ohio St. 221; Detroit, etc. R. R. Co. *v.* Bank, 20 Wis. 122; Gray *v.* Jackson, 51 N. H. 9; Piedmont Mfg. Co. *v.* Railroad, 19 S. C. 353; Marmonstein *v.* Railroad Co., 13 Misc. Rep. 32; 34 N. Y. Supp. 97, *reversing* 11 Misc. Rep. 725, 32 N. Y. Supp. 1146; Railway Co. *v.* Viers, 24 Ky. Law Rep. 356, 68 S. W. Rep. 469; Pennsylvania Co. *v.* Dickson, 31 Ind. App. 451, 67 N. E. Rep. 538, citing Hutchinson on Carr.

17. See cases cited in following section.

18. Piedmont Mfg. Co. *v.* Railroad, 19 S. C. 353.

case, if the contract contains no exemption it is absolute; in the other, if conditions are specified they must govern. This is nothing more than saying that the whole thing is per contract, and that whatever the contract is, that must be enforced—the legal construction being that in the one case, in the absence of exemptions, the carrier has contracted unconditionally to deliver; the other, with conditions inserted, they must control."

Sec. 233. (§ 149b.) Liability beyond terminus may be excluded by contract.—The liability of the carrier beyond the terminus of his own route being thus a matter of contract, it is clear that he may prevent all questions as to his liability by an express contract excluding it, and that such a contract will be enforced[19] even in those states where the rule of Muschamp's

19. *United States:* Myrick *v.* Railroad Co., 107 U. S. 102; Railroad Co. *v.* Pearce, 192 U. S. 179.

Alabama: Jones *v.* Railway Co., 89 Ala. 376.

Arkansas: Railway Co. *v.* Odom, 63 Ark. 326, 38 S. W. Rep. 339; Railroad Co. *v.* Washington, —— Ark. ——, 69 L. R. A. 65, 85 S. W. Rep. 406, citing Hutchinson on Carr.

Canada: Neil *v.* Express Co., 20 Quebec R. S. C. 253, 2 Canadian Ry. Cases 111.

Georgia: Railroad Co. *v.* Shomo, 90 Ga. 496, 16 S. E. Rep. 220, citing Hutchinson on Carr.; Railway Co. *v.* White, 108 Ga. 201, 33 S. E. Rep. 952.

Kansas: Berg *v.* Railroad Co., 30 Kan. 561; Hoffman *v.* Railway Co., 8 Kan. App. 379, 56 Pac. Rep. 331; Railroad Co. *v.* Richardson, 53 Kan. 157, 35 Pac. Rep. 1114, citing Hutchinson on Carr.

Kentucky: Railroad Co. *v.* Bourne et. al., 15 Ky. Law Rep. 445; Railroad Co. *v.* Tarter, 19 Ky. Law Rep. 229, 39 S. W. Rep. 698; Railroad Co. *v.* Chestnut & Bros., 24 Ky. Law Rep. 1846, 72 S. W. Rep. 351.

Michigan: Detroit, etc. R'y. Co. *v.* McKenzie, 43 Mich. 609.

Minnesota: Ortt *v.* Railway Co., 36 Minn. 396.

Nebraska: Fremont, etc. Railroad Co. *v.* N. Y., etc. Railroad Co., 66 Neb. 159, 92 N. W. Rep. 131, 59 L. R. A. 939.

New York: Harris *v.* Railroad Co., 36 Misc. R. 181, 73 N. Y. Supp. 159; Mills *v.* Weir, 82 App. Div. 396, 81 N. Y. Supp. 801; American Hay Co. *v.* Railroad, 85 N. Y. Supp. 341; Bishawaiti *v.* Railroad Co., 92 N. Y. Supp. 783.

Pennsylvania: Keller *v.* Railroad Co., 174 Penn. St. 62, 34 Atl. Rep. 455; See also, 196 Penn. St. 57, 46 Atl. Rep. 261.

Rhode Island: Harris *v.* Railway Co., 15 R. I. 371; Knight *v.* Railroad Co., 13 R. I. 572.

Tennessee: Bird *v.* Railway Co., 99 Tenn. 719, 42 S. W. Rep. 451, 63 Am. St. Rep. 856; Post *v.* Railway Co., 103 Tenn. 184, 52 S. W. Rep. 301, 55 L. R. A. 481, 16 Am. & Eng. Rd. Cas. (N. S.) 201; Rail-

Case prevails.[20] Such a contract is not opposed to public policy nor void as an effort to relieve the carrier of his common-law liability for negligence.[21]

Limitations of this nature are found in nearly all of the modern contracts of carriers, and will prevail under the same circumstances that any other contract would be enforced. Questions of conflict between printed conditions and written undertakings, and of the sufficiency of a mere notice to effect an exemption, must be settled by the same rule applicable to other cases.[22] And

way Co. *v.* Stone & Haslett, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. Rep. 1031, citing Hutchinson on Carr.

Texas: Hunter *v.* Railroad Co., 76 Tex. 195; Texas etc. R'y. Co. *v.* Adams, 78 Tex. 372, 14 S. W. Rep. 666; Railroad Co. *v.* Mahula, 1 Tex. Civ. App. 182, 20 S. W. Rep. 1002; Railway Co. *v.* Short, (Tex. Civ. App.) 25 S. W. Rep. 142; Railway Co. *v.* Thompson, (Tex. Civ. App.) 21 S. W. Rep. 186; Railway Co. *v.* Houston, (Tex. Civ. App.) 40 S. W. Rep. 842; Railway Co. *v.* Byers Bros., 7 Tex. Ct. Rep. 244, 73 S. W. Rep. 427; Railway Co. *v.* Campbell, (Tex. Civ. App.) 85 S. W. Rep. 1158; McCarn *v.* Railway Co., 84 Tex. 352, 19 S. W. Rep. 547, 31 Am. St. Rep. 51, 16 L. R. A. 39; International, etc. R. Co. *v.* Heittner, —— Tex. Civ. App. ——, 94 S. W. Rep. 189.

Virginia: McConnell *v.* Railroad Co., 86 Va. 248, 9 S. E. Rep. 1006.

Wisconsin: Tolman *v.* Abbot, 78 Wis. 192, 47 N. W. Rep. 264.

20. Ill. Cent. R. R. *v.* Frankenberg, 54 Ill. 88; Wabash Railroad Co. *v.* Harris, 55 Ill. App. 159; Railroad Co. *v.* Smith, 81 Ill. App. 364; Lehigh, etc. Transp. Co. *v.* Pillsbury, etc. Co., 92 Ill. App. 628. But where the provision excluding liability beyond the carrier's own line is somewhat obscured by the use of stamps, it will not be binding on the shipper. Allen *v.* Railway Co., —— Wash. ——, 84 Pac. Rep. 620.

21. Berg *v.* Railroad Co., 30 Kan. 561; Hartley *v.* Railroad Co., 115 Iowa, 612, 89 N. W. Rep. 88; Railroad Co. *v.* Earnest & Bost, (Tex. Civ. App) 77 S. W. Rep. 29. A contract providing that the carrier shall not be liable for injuries arising beyond its own line is not contrary to a section of a state constitution which provides that no common carrier shall be permitted to contract for relief from its common law liability. Railway Co. *v.* Viers, 23 Ky. Law Rep. 356, 68 S. W. Rep. 469. But if the initial carrier, although limiting its liability to its own line, runs its train over the track of a connecting carrier and uses its own engine and trainmen, it is nevertheless liable for the negligence of its servants while operating the train over such connecting line. Leonard *v.* Railroad Co., 54 Mo. App. 293; *s. c.* 57 Mo. App. 366.

22. See Illinois Cent. R. R. *v.* Frankenberg, *supra.*

the same is true in determining the effect of the acceptance of a receipt containing such an exemption.[23]

23. See *post*, § 408.

A written contract for shipment beyond the first carrier's line will control a printed clause of a bill of lading issued after the shipment has begun, which clause provides that the responsibilty of the carrier issuing the bill of lading shall cease at the terminus of its own line. Railway Co. *v.* American Trading Co., 195 U. S. 439.

In Jones *v.* Railway Co., 89 Ala. 376, the court say: "It has come to be customary for railroads, when goods are received for transportation which must pass over two or more connecting roads before reaching the place to which they are consigned, to insert a clause similar to the one found in the bill of lading before us, that is, a clause which limits the liability of each connecting road to loss or injury suffered while on its line, and until the goods are safely delivered to the next connecting line. And we have held that, when a bill of lading containing such a clause is tendered to the shipper at the time he offers his goods for shipment, and is accepted by him and the goods shipped, this is a legitimate limitation on the measure of the carrier's liability and becomes a part of the contract, binding on each of the contracting parties. Railroad Co. *v.* Thomas, 83 Ala. 343. And the following authorities assert a similar principle: Steele *v.* Townsend, 37 Ala. 247; Railroad Co. *v.* Moore, 51 Ala. 394; Railway Co. *v.* Culver, 75 Ala. 587; Alabama, etc. R. Co. *v.* Mt. Vernon Co., 84 Ala. 173; Railroad Co. *v.* Sherrod, 84 Ala. 178; Banking Co. *v.* Smitha, 85 Ala. 47. The principle announced in Railroad Co. *v.* Copeland, 63 Ala. 219, together with the right to limit the liability as declared in Railroad Co. *v.* Thomas, *supra*, may be declared to be the general doctrine in the United States, except in the few states which prohibit the limitation by statute. Hutch. Carr., §§ 151-154; note to Cole *v.* Goodwin, 32 Am. Dec. 495-507; note to Farmers', etc. Bank *v.* Champlain Transp. Co., 56 Am. Dec. 84; Railroad Co. *v.* Lockwood, 17 Wall. 357; Nutting *v.* Railroad Co., 1 Gray, 502; Darling *v.* Railroad Co., 11 Allen, 295; Packard *v.* Taylor, 35 Ark. 402; Earnest *v.* Express Co., 1 Woods, 573; Stewart *v.* Railroad Co., 1 McCrary, 312, 3 Fed. Rep. 768. It is contended for appellant that the principle declared in Thomas' Case should not be applied to this, because he could not read, and, therefore, did not know the limiting clause was in the bill of lading. . . . If plaintiff could not read, he should have informed the agent, and asked an explanation of the terms of the bill of lading. Better that he should suffer an individual loss than to declare a rule the evil consequences of which cannot be well foreseen. Goetter *v.* Pickett, 61 Ala. 387; Dawson *v.* Burrus, 73 Ala. 111; Grace *v.* Adams, 100 Mass. 505; Wheel. Carr., 222, 223. The case of Railroad Co. *v.* Meyer, 78 Ala. 597, stands on its own peculiar principles and is distinguishable from this."

Sec. 234. Same subject—Even when liability fixed by statute.—Where a state statute provided that common carriers issuing bills of lading for property received for transportation should be liable for any loss, damage or injury to the property caused by the negligence of any other carrier over whose line the same should pass to reach its destination, it was held that the general effect of the statute was to apply to common carriers the English rule of duty and liability, as distinguished from the American rule, in respect to the carriage of goods beyond their own routes;[1] that the mere acceptance of goods by the carrier destined to a point beyond his own route was sufficient to establish a *prima facie* liability on his part to be responsible for their safety until delivered at destination, but that he was still at liberty to limit his liability to his own route by a specific agreement to that effect.[2]

Sec. 235. Same subject—Other statutory provisions—Interstate commerce.—Under the new Interstate Commerce Act common carriers who are subject thereto and receive property for transportation from a point in one state to a point in another state are made liable for any loss, damage, or injury to such property caused by connecting carriers and cannot restrict their liability to their own line.[3]

1. McCann *v.* Eddy, 133 Mo. 59, 33 S. W. Rep. 71, 35 L. R. A. 110, citing Hutchinson on Carr.; *affirmed* in Railway Co. *v.* McCann, 174 U. S. 580, 19 Sup. Ct. R. 775, 43 L. Ed. 1093.

2. Dimmitt *v.* Railroad Co., 103 Mo. 440, 15 S. W. Rep. 761; Drew Glass Co. *v.* Railway, 44 Mo. App. 416; Hill *v.* Railway Co., 46 Mo. App. 517; Hance *v.* Railway Co., 56 Mo. App. 476; *id.* 62 Mo. App. 60; State Nat'l Bank *v.* Railway Co., 72 Mo. App. 82; Marshall *v.* Railway Co., 74 Mo. App. 81; Nines *v.* Railway Co., 107 Mo. 475, 18 S. W. Rep. 26; McCann *v.* Eddy, *supra;* Marshall, etc. Grain Co. *v.* Railroad Co., 176 Mo. 480, 75 S. W. Rep 638, 98 Am. St. Rep. 508; Western Sash & Door Co. *v.* Railroad Co., 177 Mo. 641, 76 S. W. Rep. 998. But see earlier cases of Baker *v.* Railway Co., 34 Mo. App. 98; Heil *v.* Railroad Co., 16 Mo. App. 363; Orr *v.* Railroad Co., 21 Mo. App. 333.

Where a receipt is required by statute of a connecting carrier, no particular form is necessary. Miller *v.* Railway Co., 33 S. Car. 359, 11 S. E. Rep. 1093.

3. See *post,* p. 600.

And where a statute required that every contract limiting the liability of an initial carrier on an interstate shipment to its own line should be signed by the shipper, or otherwise be invalid, it was held that the statute was reasonable and was aimed to protect the shipper by having it clearly manifested by his signature that his attention had been called to the limitation in the contract.[4]

Sec. 236. (§ 150.) Even under contract for through carriage intermediate carrier who causes injury may be held liable. —None of the cases in this country, however, outside of the state of Georgia, has gone the length of holding in accordance with the English rule, that the owner of the goods which have been lost or damaged whilst in the custody of the carrier must seek his remedy exclusively from the carrier to whom the goods were in the first place intrusted and with whom the contract for their carriage was in the first place made; but even where the English rule as to the extent of the obligation to carry has been adopted, the right of the owner to proceed against the carrier in fault in causing the loss or damage has been fully recognized and is every day acted upon. The supreme court of Georgia, however, consistently adhered to the theory of the English courts throughout, and long denied the right of action against any of the connecting or subsidiary carriers, and confined the injured party to his remedy against the carrier to whom the bailment was in the first instance made,[5] though a different rule has since been established in that state by statute.[6] But the rule which allows the action against the carrier in fault as well as against the one who is primarily responsible certainly commends itself upon grounds of both justice and convenience, and, with the above exception, is the universal law of this country.[7] And while it has been

4. Railroad Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 42 L. Ed. 759, 18 Sup. Ct. R. 335.

5. Mosher *v.* The So. Ex. Co., 38 Ga. 37; Southern Ex. Co. *v.* Shea, *id.* 519.

6. Code, § 2084; Western, etc. R. Co. *v.* Cotton Mills, 81 Ga. 522.

7. Ill. Cen. R. R. Co. *v.* Cowles, 32 Ill. 116; Anchor Line *v.* Dater, 68 *id.* 369; C. & N. W. Ry. Co. *v.* The Packet Co., 70 *id.* 218; Barter *v.* Wheeler, 49 N. H. 9; Southern Ex. Co. *v.* Hess, 53 Ala. 19; Halliday *v.* Railway Co., 74 Mo. 159; Packard *v.* Taylor, 35 Ark. 402; International, etc. R. Co. *v.* Tisdale, 74 Tex. 8; Chesapeake, etc.

frequently urged that the fact that the auxiliary carrier acts in the transportation as the agent of the contracting carrier, and that there is no privity of contract between him and the owner of the goods, should relieve him from answering to the owner for any loss or injury to the goods while in his custody, the courts have consistently held that the public character of his employment is such as to impose upon him the duty of safely transporting all goods of the kind he professes to carry, whether received from the owner himself or from another carrier with whom the owner has contracted, and that for any loss which may arise either from his negligence or misfeasance he can be held responsible.

Sec. 237. (§ 151.) Carrier may contract for the entire transportation.—And as the carrier may thus exempt himself from liability by express contract, so it is universally conceded that he may bind himself by an express contract to carry to any distance or to any destination, whether the carriage can be accomplished by his own means of conveyance upon his own route or will require the employment of agents or subsidiary carriers beyond it.[8] In this respect he may bind himself to the same extent as other contracting parties, even to the performance of impossibilities if he will. The contract, however, according to the prevailing opinion, must be express. It will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.[9]

R'y. Co. *v.* Radbourne, 52 Ill. App. 203; Railway Co. *v.* Twiss, 35 Neb. 267, 53 N. W. Rep. 76, 37 Am. St. Rep. 437; Railway Co. *v.* Henderson, 57 Ark. 402, 21 S. W. Rep. 878, citing Hutchinson on Carr.; Cavalarro *v.* Railway Co., 110 Cal. 348, 42 Pac. Rep. 918, 52 Am. St. Rep. 94, citing Hutchinson on Carr.; United States Mail Line Co. *v.* Mf'g. Co., 101 Ky. 658, 42 S. W. Rep. 342, citing Hutchinson on Carr.; Johnson *v.* Railway Co., 90 Ga. 810, 17 S. E. Rep. 121; Railway Co. *v.* Viers, 24 Ky. Law Rep. 356, 68 S. W. Rep. 469, citing Hutchinson on Carr.

8. See *ante*, § 225.

9. Myrick *v.* Railroad Co., 107 U. S. 102; Taylor *v.* The Railroad, 87 Me. 299, 32 Atl. Rep. 905; Hoffman *v.* Railroad Co., 85 Md. 391, 37 Atl. Rep. 214; Hoffman *v.* Railway Co., 8 Kan. App. 379, 56 Pac. Rep. 331; Railway Co. *v.* Swenson, (Tex. Civ. App.) 25 S. W. Rep. 47.

Where a drayman, engaged in the business of carrying goods

Sec. 238. (§ 152.) What constitutes such a contract.—But while it is thus true that the carrier may contract for through carriage, the important and difficult question is, what constitutes such a contract. Where the undertaking is express, there can, of course, be no difficulty, but where it is to be implied from the surrounding circumstances, difficulties present themselves. Much depends, also, upon the general view which prevails in the state in which the question arises respecting the rule of Muschamp's Case, for it is obvious that in the states in which that rule obtains, much less evidence will establish a contract for through carriage than in those states in which it does not prevail. Thus in the former states the mere acceptance of the goods for carriage when consigned to a point beyond the carrier's terminus is sufficient to imply a contract for through carriage,[10] while in the latter states, this alone,[11] or the payment of a through rate,[12] is not conclusive.

Where the contract is express, no resort need, of course, be had to circumstantial evidence; but where it is not express and

within certain territorial limits, enters into a contract to carry to a point beyond the limits of such territory, his liability, on the same principle that a carrier by railroad would be liable under a contract to carry beyond his own line, will continue until the contract is performed. Farley *v.* Lavary, 107 Ky. 523, 54 S. W. Rep. 840, 47 L. R. A. 383.

But where the carrier contracts to carry live stock to a point on the line of a connecting carrier, he will not be liable for injury to stock which is loaded on the cars at a point on the line of the connecting carrier. Hartley *v.* Railroad Co., 115 Iowa, 612, 89 N. W. Rep. 88.

10. See *ante*, § 230.

11. See *ante*, § 231.

12. Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; Camden R. R. *v.* Forsyth, 61 Pa. St. 81; Lamb *v.* Railroad Co., 46 N. Y. 271; Piedmont Mfg. Co. *v.* Railroad Co., 19 S. C. 353; Hill *v.* Railroad Co., 60 Iowa, 197; Illinois Cent. R. Co. *v.* Kerr, 68 Miss. 14, 8 So. Rep. 330; Gulf, etc., Ry. Co. *v.* Griffith (Tex. Civ. App.), 24 S. W. Rep. 362; Pennsylvania Co. *v.* Dickson, 31 Ind. App. 451, 67 N. E. Rep. 538.

The payment and receipt of one entire compensation is not sufficient in itself to establish a through contract to carry beyond the initial carrier's own line, but is a fact to be considered in connection with other circumstances as going to show the intent and understanding of the parties with respect to such a contract. Page *v.* Railway Co., 7 S. Dak. 297, 64 N. W. Rep. 137.

the contract becomes a question of fact for the jury, then all the surrounding circumstances become important. In such a case the fact that the goods were marked for through transportation, that a through rate was paid, that the goods were to be carried through in a designated car, that there was an usage for through carriage, that the caption of the bill of lading or receipt purports a through contract, and any other fact throwing light upon the intention, may properly be considered.[13] And while the existence of any single fact of this kind may not be in all cases sufficient to establish conclusively that such was the contract, it may always be shown to the jury as conducive to that end.[14] And such a contract when proven will be valid, though it may re-

13. International, etc., R. Co. *v.* Tisdale, 74 Tex. 8; Berg *v.* Steamship Co., 5 Daly, 394; Candee *v.* Railroad Co., 21 Wis. 582; Evansville, etc., R. R. Co. *v.* Androscoggin Mills, 22 Wall. 594; Robinson *v.* Merchants' Dispatch Trans. Co., 45 Iowa, 470; Isham *v.* Erie R. Co., 98 N. Y. Supp. 609. The fact that the agent gives a through rate and collects the entire charge are circumstances strongly tending to show a contract for through carriage. Pittsburg, etc., Ry. Co. *v.* Bryant, —— Ind. App. ——, 75 N. E. Rep. 829.

14. Root *v.* The Railroad, 45 N. Y. 532; Hill Man. Co. *v.* The Railroad, 104 Mass. 122; Gray *v.* Jackson, 51 N. H. 9; Woodward *v.* The Railroad, 1 Biss. 403. Quimby *v.* Vanderbilt, 17 N. Y. 306, is a leading case and one very often referred to when the question is, what is necessary to constitute a contract for through transportation by the carrier? The defendant was the owner of a line of steamships plying between New York and the Isthmus of Nicaragua. He was also part owner in several of the steamships constituting another line running between the Isthmus and San Francisco. He advertised "Vanderbilt's New Line" as the only through line via Nicaragua to San Francisco. The Transit Company which carried across the Isthmus was independent of both these ocean lines, but furnished tickets to the defendant for which he accounted to it as he sold them with the tickets of the ocean lines. The defendant and the company running its line upon the Pacific had a common agent in New York from whom the plaintiff purchased three of these tickets, one from New York to the Isthmus, another across the Isthmus, and another thence to San Francisco in a designated vessel in which the defendant, however, had no interest, the tickets together entitling the plaintiff to a passage by these various lines from New York to San Francisco. He paid for them the round sum of $250 to the common agent. The plaintiff was carried to the Isthmus but could find no vessel there to take him to San Francisco, and becom-

ing sick from the effects of the climate, he returned to New York and sued the defendant for the damage sustained by him in the failure to transport him to San Francisco according to the contract. It was insisted on behalf of the defendant that there was no through contract on his part and that he could not be held liable for the failure of the Pacific line to carry the plaintiff according to the agreement imported by its ticket; but the defense did not avail, and the defendant was held liable upon the ground that his contract was for the through transportation of the plaintiff to San Francisco. "But the defendant's counsel contends," said Denio, J., "that the tickets which the plaintiff received for the passage over the several routes are in themselves written evidence of the bargains by which he engaged his passage, and that he is precluded from contradicting them by parol testimony of an entire contract with the defendant. We do not think this a sound position. The tickets do not purport to be contracts. They are rather in the nature of receipts for the separate portions of the passage money; and their office is to serve as tokens to enable the persons having charge of the vessels and carriages of the companies to recognize the bearers as parties who were entitled to be received on board. They are quite consistent with a more special bargain. Being the usual permits which were issued for the guidance of the masters of the vessels and the conductors of the carriages, they would necessarily be given to the passenger to facilitate the transaction of the business, whatever the nature of his arrangement for passage may have been. Their character as mere tokens is shown by the fact that the defendant received them in large numbers of the Transit Company, not as an agent of that company for the purpose of making bargains in its behalf with others, but to furnish them to persons with whom he expected to deal on his own account. In Hart *v.* The Renssalaer & Saratoga Railroad Company, just referred to, the plaintiff had separate tickets for each of the roads over which she traveled, but she was permitted to recover against one of the companies, though unable to show that her baggage was lost on the route of that company. We do not say that the receiving of separate tickets for the different lines is not evidence of some weight upon the question whether the contract was entire, but we hold it does not come within the rule which excludes parol testimony respecting a contract which has been reduced to writing." See, also, Williams *v.* Vanderbilt, *supra;* Van Buskirk *v.* Roberts, *supra*, in which the facts were similar, and were held to prove a contract for the entire transportation from New York to San Francisco.

There is no doubt, however, that if in these cases it had only been proven that the tickets for the different lines had been sold by the defendants the conclusion would have been different. It is now well settled that one passenger carrier may sell his own and at the same time the tickets of connecting lines, entitling the purchaser to through transportation to his des-

tination over all the lines, and may receive the fare for the whole distance without becoming responsible for the passenger's carriage beyond his own line; and in fact, where nothing else appears in the transaction, this will be the legal construction put upon it. The tickets for the several lines are, in such cases, known as coupon tickets, and each ticket is considered as the separate contract of the carrier over whose route it entitles the holder to be carried. The carrier who sells them is supposed to do so as the agent of the several lines, and the tickets are regarded and treated as the contracts of the respective carriers precisely as if they had been sold by the carriers themselves instead of the common agent. Knight *v.* The Railroad, 56 Me. 234; Milnor *v.* The Railroad, 53 N. Y. 363; Nashville, etc., R. R. *v.* Sprayberry, 9 Heisk. 852; Brooke *v.* The Railway, 15 Mich. 232; Hartan *v.* The Railroad, 114 Mass. 44; Stimson *v.* The Railroad, 98 *id.* 83; Ellsworth v. Tart, 26 Ala. 733; Kessler *v.* The Railroad, 7 Lans. 62; Hood *v.* The Railroad, 22 Conn. 1; Elmore *v.* The Railroad, 23 *id.* 457; Sprague *v.* Smith, 29 Vt. 421.

But see Furstenheim *v.* The Railroad, 9 Heisk. 238, in which a different view of the subject was taken. This, however, is clearly wrong according to the authorities. But see to same effect, Candee *v.* The Railroad, 21 Wis. 582, and Ill. Cen. R. R. *v.* Copeland, 24 Ill. 332. In this respect a distinction is made between carriers of freight and carriers of passengers and their baggage, the receipt or bill of lading for freight to its destination and the payment of the price for the entire transportation being generally held to be a through contract of the receiving company. One reason for this distinction undoubtedly is that the passenger who accompanies his baggage can always know where and by whose fault he sustained the injury or the loss, and by whom the responsibility for it should be borne; whereas in the case of goods sent over a number of connecting lines it may be difficult and often impossible to obtain such information. If, however, circumstances can be shown, as in the foregoing case of Quimby *v.* Vanderbilt, from which it would appear that the intention of the parties was to enter into a contract for the entire transportation, or if a partnership existed between the carriers, or if the succeeding carriers were acting in the carriage of the passenger as agents of the first under its contract with him for through transportation, the passenger, if injured, might maintain his action against either the first carrier upon the contract or against any of the succeeding carriers to whose negligence or fault the injury was imputable. And when the contract in such a case imposes upon the first carrier the liability for the entire transportation, the coupon tickets will be regarded merely as so many tokens or vouchers entitling the holder to be carried by the succeeding carriers as agents of the first.

Whether the carrier under the circumstances of the acceptance of freight will be held to be bound to carry and be responsible for it throughout its transit to destina-

quire transportation and delivery in another state or country beyond the line of the carrier.[15]

Sec. 239. Same subject—Illustrations.—Where a bill of lading issued for the shipment of fruit over several connecting lines provided that the fruit was received subject to the carrier's liability under the common law and statutes in force in the different states through which the shipment was to pass, and, further, that the car was to be re-iced as often as necessary, it was held that the bill of lading constituted a contract for through transportation.[16] A similar conclusion was reached where the bill of lading stated that the goods were to be transported by the receiving carrier to his own terminus and from such point by connect-

tion over auxiliary lines as well as its own will depend in a great measure upon the law of the place of the making of the contract or of the acceptance of the goods, or of the performance of the service. In those states in which the applicatory law would be that of the English courts, which would bind the carrier, without an agreement restricting his responsibility to his own line, to carry throughout to destination, the mere acceptance of the goods consigned to a particular destination would import a contract for through carriage and make the carrier responsible for their loss anywhere upon the route. But where the English rule has been rejected, a through contract must be either express or must arise from some of the circumstances mentioned in the text. In some of the cases it has been held that a receipt or bill of lading for the goods to be carried to a particular destination, and the payment of the entire freight, will be sufficient, in the absence of any special agreement upon the subject, to constitute such a contract; while in others this has been denied. See cases *infra* in text and note. Where the subject is not controlled by any rule of law or by the express agreement of the parties, the question will be one of intention, depending upon the usage of the carrier and the facts of the case, which sometimes makes it difficult to decide whether a through contract was meant or not; and it is an argument in favor of the English rule that, when it prevails, such questions cannot easily arise. Knapp *v.* U. S. Ex. Co., 55 N. H. 348; Grindle *v.* The Eastern Express, 67 Me. 317.

15. Burtis *v.* The Railroad, 24 N. Y. 272; Bennett *v.* The Peninsular Steamboat Co., 6 Com. B. 775; Phillips *v.* The Railroad, 78 N. C. 294.

16. Johnson *v.* Railway Co., 133 Mich. 596, 10 Det. Leg. N. 324, 95 N. W. Rep. 724, 103 Am. St. Rep. 464.

ing lines to destination.[17] So where the contracting carrier had the right under the bill of lading to select the connecting lines over which the shipment was to pass, and a through freight charge was collected and receipted for, and it further appeared that the first and all succeeding carriers had a traffic arrangement whereby a through rate was agreed upon which was shared in common by all of them, it was decided that the contract imposed a through liability.[18] So where the carrier accepted goods marked for delivery at a point beyond his terminus, and a through rate was quoted and accepted by the shipper, it was held that the carrier thereby assumed responsibility for the safe delivery of the goods at destination.[19] So a bill of lading which provided that the goods were to be forwarded to the end of the first carrier's line and there delivered to a connecting carrier, and further on the back thereof that the goods were to be forwarded to destination, was held to constitute a through contract.[20] But the fact that a car containing live stock was waybilled to a particular place on a connecting carrier's line was held insufficient to show a contract for through liability.[21] So the words, "ice when needed," inserted in the bill of lading which further provided that the receiving carrier would not be liable for loss or damage not occurring on its line of road, were held to impose on the carrier no obligation to ice the shipment while on a connecting road.[22] And where the charge collected, although for the entire route, was made up of distinct sums proportioned to the line of each connecting carrier, it was held

17. Ireland *v.* Railroad Co., 20 Ky. Law Rep. 1586, 49 S. W. Rep. 188; but see dissenting opinion, 49 S. W. Rep. 453.

18. Eckles *v.* Railway, 112 Mo. App. 240, 87 S. W. Rep. 99.

19. Jennings *v.* Railway Co., 127 N. Y. 438, 28 N. E. Rep. 394; *affirming, s. c.* 52 Hun, 227, 5 N. Y. Supp. 140. But the mere statement by the agent that the goods will be sent to a point on another line is not sufficient to show a through contract. Weis *v.* Railroad Co., 97 N. Y. Supp. 993.

20. Colfax Mt. Fruit Co. *v.* Railroad Co., 118 Cal. 648, 46 Pac. Rep. 668, 50 Pac. Rep. 775, 40 L. R. A. 78.

21. Herring *v.* Railroad Co., 101 Va. 778, 45 S. E. Rep. 322.

22. Farnsworth *v.* Railroad Co., 84 N. Y. Supp. 658, 88 App. Div. 320.

that the contract was separable and imposed no liability on the contracting carrier beyond the terminus of his own route.[23]

Sec. 240. Extent to which carrier may limit his liability under contract for through carriage.—While the carrier, as has been seen, may, by an express contract that he will assume no liability for the goods after he has safely delivered them to a connecting carrier, prevent all question as to his liability for a loss or injury occurring on the connecting route, it remains to be seen to what extent he may thus exonerate himself from liability where by his contract he has undertaken to carry the goods through to destination. If the contract clearly provides for through carriage, or the facts and circumstances disclose an undertaking to transport the goods to their ultimate destination, all subsidiary carriers employed in the transportation will become the agents of the contracting carrier to effect the performance of the contract, and he can no more stipulate for exemption from liability for the negligent acts or omissions of such agents than he can stipulate for exemption from liability for his own. He may, however, by a contract to that effect, relieve himself from liability as an insurer of the goods not only while they are being transported over his own line but over the lines of the connecting carriers, but he will still remain liable until the goods have been delivered at destination for any loss or injury arising from negligence.[24]

23. Hughes *v.* Railroad Co., 202 Penn. St. 222, 51 Atl. Rep. 990, 97 Am. St. Rep. 713, 63 L. R. A. 513.

24. Galveston, etc. R. Co. *v.* Allison, 59 Tex. 193; Ireland *v.* Railroad Co., 20 Ky. Law Rep. 1586, 49 S. W. Rep. 188; Halliday *v.* Railroad Co., 74 Mo. 159, 41 Am. Rep. 309; Cincinnati, etc. R. Co. *v.* Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Condict *v.* Railroad Co., 54 N. Y. 500; Railroad Co. *v.* Vaughn, 4 Tex. Civ. App. 281, 16 S. W. Rep. 775; Eckles *v.* Railway Co., 112 Mo. App. 240, 87 S. W. Rep. 99; Railway Co. *v.* Western Hay & Grain Co., 2 Neb. (unofficial) 784; 90 N. W. Rep. 205. But see, Fremont, etc. Railroad Co. *v.* N. Y. etc. Railroad, 66 Neb. 159, 92 N. W. Rep. 131, 59 L. R. A. 939.

Where a copartnership or association exists between several lines of carriers, the initial carrier cannot limit his liability to his own line for injuries to through freight. Gulf, etc. R'y Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. Rep. 302. See *post*, § 450.

Sec. 241. (§ 152a.) Implied power of agents to make contracts for through carriage.—The question whether a local freight agent of a carrier has implied authority to make a contract for through carriage is involved in the same conflict as the question whether the mere acceptance of the goods destined to a point beyond the carrier's route constitutes a contract to assume responsibility for their safe delivery at such point, and is determined by much the same reasons.[25]

Under the English rule[26] and the cases adopting it, it is held that the agent authorized to receive the goods for carriage has implied authority to bind his principal by a contract for through carriage;[27] but under the American rule, it is held that, while the general freight agent of a railroad may have such authority,[28] it will not be implied in the case of local freight agents from their general authority to receive and receipt for goods offered for transportation over the carrier's road;[29] and the mere fact

25. See *post*, § 460 *et seq.*

26. See Watson *v.* Railway Co., 15 Jurist, 448; Scothorn *v.* Railway Co., 8 Exch. 341; Bristol, etc. R'y Co. *v.* Collins, 7 H. L. Cases, 194.

27. It was so held in Hansen *v.* Railway Co., 73 Wis. 346; Nichols *v* Railroad Co., 24 Utah 83, 66 Pac. Rep. 768, 91 Am. St. Rep. 778.

The freight clerk of an express company has implied authority to give the rates at which property is to be delivered at a point on the line of another company. Express Co. *v.* Boullement, 100 Ala. 275, 13 So. Rep. 941.

28. Grover, etc. M. Co. *v.* Railway Co., 70 Mo. 672; White *v.* Railroad Co., 19 Mo. App. 400.

An agent employed to solicit freight traffic has implied authority to bind his principal for the safe delivery of goods at a point beyond his own line and to contract over what road beyond such line the property shall be transported. Fremont, etc. R. Co. *v.* New York, etc. R. Co., 66 Neb. 159, 92 N. W. Rep. 131, 59 L. R. A. 939.

29. Burroughs *v.* Railroad Co., 100 Mass. 26; Grover, etc. M. Co. *v.* Railway Co., *supra;* Turner *v.* Railroad Co., 20 Mo. App. 632; Faulkner *v.* Railway Co., 99 Mo. App. 421, 73 S. W. Rep. 927; McLagan *v.* Railway Co., 116 Iowa, 183, 89 N. W. Rep. 233; Hoffman *v.* Railroad Co., 85 Md. 391, 37 Atl. Rep. 214; Page *v.* Railway Co., 7 S. Dak. 297, 64 N. W. Rep. 137; Gulf, etc. R'y Co. *v.* Jackson & Edwards, —— Tex. ——, 89 S. W. Rep. 968, *reversing* (Tex. Civ. App.) 86 S. W. Rep. 47.

Strictly speaking, the business of the carrier is confined to his own line and the general scope of the authority of a subordinate must be limited to the carrier's business. Pittsburgh, etc. Ry.

that a through rate of freight is collected or that the goods are billed for through shipment will be insufficient to support an inference that he has such authority.[30] But although implied authority is denied a local freight agent to make a contract for through carriage, a usage or custom may be shown for such agent to receive goods under a contract for through carriage, and when such usage or custom is established, the principal will be bound by the act of the agent.[31]

Sec. 242. (§ 153.) No distinction between corporations and other carriers in respect to power to enter into contracts for through carriage.—A distinction has, however, been made in some of the cases between chartered or incorporated carriers, such as railway companies, which derive all their power or authority to engage in the business and to assume its obligations and liabilities from their charters, and which by the very terms of their incorporation are limited to routes between certain designated points, and other carriers not so incorporated; and it has been said that such companies or corporations in their business as carriers could not, even by express contract, bind themselves to carry beyond these designated lines, so as to impose upon themselves the obligations of common carriers, and that, *a fortiori*, no such contract could be implied. But this idea has been in the later and best considered cases denied, and may be now considered as abandoned.[32] The question has also been discussed be-

Co. *v.* Bryant — Ind. App. —, 75 N. E. Rep. 829.

30. Coates *v.* Railway Co., 8 S. Dak. 173, 65 N. W. Rep. 1068; Sutton *v.* Railway Co., 14 S. Dak. 111, 84 N. W. Rep. 396.

31. Faulkner *v.* Railway Co., 99 Mo. App. 421, 73 S. W. Rep. 927; Railway Co. *v.* Cole, 8 Tex. Civ. App. 635, 28 S. W. Rep. 391.

32. Swift *v.* Steamship Co., 106 N. Y. 206; Perkins *v.* The Railroad, 47 Me. 573; Western, etc. R. R. *v.* McElwee, 6 Heisk. 219; Buffet *v.* The Railroad, 40 N. Y. 168; Root *v.* The Railroad, 45 *id.* 524; Burtis *v.* The Railroad, 24 *id.* 269; Hill Manuf'g Co. *v.* The Railroad, 104 Mass. 122; Feital *v.* The Railroad, 109 *id.* 398; Noyes *v.* The Railroad, 27 Vt. 110; Railroad Co. *v.* Pratt, 22 Wall. 123; Steamboat Co. *v.* Brown, 54 Penn. St. 77; Schroeder *v.* The Railroad, 5 Duer, 55; West *v.* The Railroad, 4 Seld. 57; Railroad Co. *v.* Dupont, 128 Fed. 840, 64 C. C. A. 478; Railway Co. *v.* Howard, 178 U. S. 153, 20 Sup. Ct. R. 880, 44 L. Ed. 1015, *affirming* 14 App. D.

fore the English courts, which have likewise held that such a contract by an incorporated carrier was not *ultra vires*, but valid and obligatory upon it.[33] The supreme court of Connecticut has, however, held in a number of cases, and it may be regarded as the settled law of that state, that such incorporated companies are not competent to bind themselves as carriers for the carriage of goods beyond the limits of their routes as fixed by their charters, and that all such contracts are void, and create no obligation on the part of the corporations.[34]

Sec. 243. (§ 154.) No liability for loss beyond his own line under contract to carry to end of line and there to deliver to next carrier.—But where the place of destination is not upon the carrier's route, and he receives the goods under a contract to send or forward them by his own route to the point most convenient to their destination reached by him, and there to deliver them to an agent or to another carrier to complete the transportation, he cannot be made liable for the goods beyond the terminus of his own line, and if he deliver safely to such agent or carrier, he will have complied with his contract and will be discharged from all further liability.[35]

C. 262. And see Bissell *v.* The Michigan, etc. Railroad, 22 N. Y. 258, where this question is discussed at great length and with great ability on opposing sides by Comstock, C. J., and Selden, J.

In Massachusetts it is said that when a corporation is established for the purpose, among others, of transporting goods over a certain route, goods delivered to such corporation directed to a more distant place are presumed to be received for the purpose of being carried by it over its own route only, and then forwarded by another carrier to their destination. Burroughs *v.* The Railway, 100 Mass. 26; Pendergrast *v.* Adams Ex. Co., 101 *id.* 123. But when there is no charter to indicate the limits of the carrier's business, and no written agreement between it and the other party, the question, what was in fact the extent of the undertaking, is a question for the jury. Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189. And in Perkins *v.* The Railroad, 47 Me. 573, it was held that a contract to bind such a corporation to transport beyond its line must be express.

33. Wilby *v.* The Railway, 2 Hurl. & N. 703.

34. Hood *v.* The Railroad, 22 Conn. 502; Naugatuck R. R. Co. *v.* The Button Co., 24 *id.* 468; Converse *v.* The Transportation Co. 33 *id.* 166.

35. Pendergrast *v.* Adams Ex. Co., 101 Mass. 120; American Ex.

Sec. 244. (§ 155.) Same subject—Meaning of the term "to forward" or "to be forwarded."—But if, notwithstanding the words used, the real contract be to carry the goods throughout the whole route, it will be immaterial that in his receipt for the goods the carrier has made use of any form of expression which would seem intended to impose upon him only the obligation to forward them by another carrier at the termination of his own route. The words "to forward" or "to be forwarded" are of frequent use in the receipt of carriers, and it sometimes becomes important to determine their meaning in the connection in which they are employed, as the whole question of the liability of the carrier may depend upon their interpretation.

Sec. 245. (§ 156.) Same subject.—In Reed *v.* The United States Express Company[36] a package was delivered to the defendant as an express carrier at Chicago, to be carried to Dalton, Georgia, which it undertook by the terms of its receipt "to forward to Dalton." This it could only have done, as was admitted, by transmitting the package from the terminus of its own route by other carriers, its own line not extending to the point of destination; and under these circumstances, it was held, by a divided court however, that the carrier, by the acceptance of the package and the contract "to forward," had bound itself as a forwarder only beyond the terminus of its own route, the words "to forward" in the receipt being construed as equivalent to the words "to send;" and it being shown that the defendant had safely delivered the package to a connecting carrier for further

Co. *v.* Second Nat. Bank, 69 Penn. St. 394; U. S. Ex. Co. *v.* Rush, 24 Ind. 403; Inhabitants, etc. *v.* Hall, 61 Me. 517; Myrick *v.* Railroad, 107 U. S. 102; Rickerson, etc. Co. *v.* Railroad Co., 67 Mich. 110; Detroit, etc. R'y Co. *v.* McKenzie, 43 Mich. 609; McEacheran *v.* Railroad Co., 101 Mich. 264, 59 N. W. Rep. 612; Lake Erie, etc. Railroad Co. *v.* Condon, 10 Ind. App. 536, 38 N. E. Rep. 71; Railway *v.* Woodward, 164 Ind. 360, 72 N. E. Rep. 558; *s. c.* 73 N. E. Rep. 810; Eckles *v.* Railway, 112 Mo. App. 240, 87 S. W. Rep. 99; Palmer *v.* Railroad Co., 101 Cal. 187, 35 Pac. Rep. 639, citing Hutchinson on Carr.; Railroad Co. *v.* Waters, 50 Neb. 592, 70 N. W. Rep. 225; Dunbar *v.* Railway Co., 62 S. Car. 414, 40 S. E. Rep. 884; Hoffman *v.* Railroad Co., 85 Md. 391, 37 Atl. Rep. 214.

36. 48 N. Y. 462.

transportation towards its destination, it was held that it had discharged its contract and was not liable for its subsequent loss.[37]

Sec. 246. (§ 157.) Same subject.—But where there are no circumstances which will control the conclusion as to the meaning of the parties in the use of these terms, the weight of authority is in favor of giving to them the signification which was contended for by the dissenting portion of the court in the foregoing case, and they will be construed as having been intended to mean to carry or transport and not merely to send as a forwarder. In other words, they will, except under special circumstances which will necessarily show that they were used in a different sense, bind the carrier for the entire carriage to destination, and make him responsible for the goods throughout the transit.[38]

37. From this decision Lott, Ch. C., and Hunt, C., dissented. The latter, in his dissenting opinion, called attention to the fact that no distinction was made in the contract between the duty assumed to carry to New York, the terminus of the carrier's line, and to Dalton, and that the language employed which bound the carrier to the two undertakings was the same. "It is conceded," said he, "by the defendant's counsel that its liability to New York is that of a carrier, and that it is sufficiently expressed by the engagement to 'forward' the package, and that it is not qualified by the expression that it is to be liable as forwarder only. There is no propriety in giving to this word two different meanings. It is the general rule that a word, when repeated in the same sentence or the same connection, is to bear the same signification. It would certainly be a violent assumption to impute different meanings at the same time to a word when used but once in a sentence. When the defendant undertakes to forward this package from Chicago to Dalton it is a single contract. This contract is denoted by a single word, and that is the same throughout the distance. Although it was in fact an extension of its liability beyond its own line, I am satisfied that the defendant, by the words made use of, undertook and assumed to carry and deliver this package to its destination in Georgia."

38. E. Tenn. & Va. R. R. *v.* Rogers, 6 Heisk. 143; Cutts *v.* Brainerd, 42 Vt. 566; St. Louis, etc. Railway *v.* Piper, 13 Kan. 505; Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Lock *v.* The Railroad, 48 N. H. 339; Wilcox *v.* Parmelee, 3 Sand. 610; Schroeder *v.* The Railroad, 5 Duer. 55; Buckland *v.* Adams Ex. Co., 97 Mass. 124; Eckles *v.* Railway, 112 Mo. App. 240, 87 S. W. Rep. 99, citing Hutchinson on Carr.; Davis *v.*

Sec. 247. Who is a connecting carrier—Transfer company. —"A connecting carrier," it is said in the case of Nanson *v.* Jacob,[39] "is one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination. It becomes such by virtue of the agreement between the consignor or shipper and the first carrier, whereby the latter undertakes to deliver the shipment at its ultimate destination, and thus makes the carrier beyond its own route its agent for continuing the transportation, or else undertakes only to deliver the goods safely to the next carrier on the route, who thus becomes the agent of the shipper for carrying them further."

Thus a railroad company which took loaded cars from a preceding road and transferred them by means of a switch engine over a portion of its own track to a spur track where they were to be unloaded was held to be a connecting carrier and liable as such for the safety of the goods transported by it.[40] But a transfer company at the point of destination which undertakes merely to make delivery to consignees is not a connecting carrier, since, in so transporting the goods, it is not acting under and by virtue of the original contract of carriage.[41] And where a bill of lading required delivery of the goods at the mills of the consignee, and the railroad company bringing the goods to destination procured another road to deliver them at the mills, which were two and one-half miles from the depot, it was held that the latter road was not a connecting carrier, delivery to which released the former, but, like the transfer company in the preceding case, was a mere instrument to effect delivery.[42] So a local belt railway

Jacksonville, etc. Line, 126 Mo. 69, 28 S. W. Rep. 965; Colfax Mt. Fruit Co. *v.* Railroad Co., 118 Cal. 648, 46 Pac. Rep. 668, 50 Pac. Rep. 775, 40 L. R. A. 78.

39. 12 Mo. App. 125.

40. Railway Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. Rep. 899.

41. Nanson *v.* Jacob, 12 Mo. App. 125.

42. Western, etc. R. Co. *v.* Cotton Mills, 81 Ga. 522.

Where the first carrier contracts to transport goods to destination and engages a terminal company to complete the transportation, the shipper will not be liable for the extra expense incurred by the former carrier. Hendrix *v.* The Railroad, 107 Mo. App. 127, 80 S. W. Rep. 970.

which is used by an initial carrier to make delivery of the goods to the next succeeding carrier is not a connecting carrier.[43]

Sec. 248. Authority of contracting carrier to bind connecting carrier by contract.—In the absence of any agreement, custom or course of dealing from which authority may be implied, the contracting carrier has no authority to make a contract with the shipper which will be binding on the connecting carrier. If the line of connecting carrier is so situated in relation to the line of the contracting carrier that the law would require the former carrier to receive and carry the goods tendered to it, it would be liable if it should refuse to receive them, or, if it should accept them for transportation, if they were lost or injured through a breach of its common law duty; but its liability in this regard would not be based upon the unauthorized contract made by the first carrier.[44] If, however, the connecting carrier accepts the goods under the original contract with the first carrier, it will become a party to it by adoption and ratification and may be held responsible for any breach of its terms.[45]

Sec. 249. (§ 158.) Partnerships and associations between carriers.—Divided as opinions may be upon the question of the liability of the carrier who undertakes the transportation for losses by merely connecting or succeeding carriers when it becomes necessary to employ them to further or to complete the carriage, where there is no partnership or other arrangement creating a similar relation between them, it is universally agreed that if any connection of that character exists by which they become participants in common in the profits of the business, any one or all of them may be held liable at the option of the loser. A partnership may undoubtedly be formed as well in the business of carriers as in any other, and between corporations engaged in that business as well as between individuals, so as to

43. Texas, etc. R'y Co. *v.* Scoggin & Brown, — Tex. Civ. App. —, 90 S. W. Rep. 521.

44. Houston, etc. R. Co. *v.* Everett, — Tex. —, 89 S. W. Rep. 761, *reversing* (Tex. Civ. App.), 86 S. W. Rep. 17.

45. Chicago, etc. R. Co. *v.* Chestnut Bros., — Ky. —, 89 S. W. Rep. 298.

make them individually and jointly liable; and whether such a partnership has been entered into or exists between them must be decided upon the same principles as govern in other cases; and when established, it must, of course, be attended by the same consequences to the partners; as is illustrated by the case which has been so often decided by the courts, of the proprietors of different portions of a stage line, each of whom agrees to stock and employ drivers for his own particular portion of the road, under an agreement to share the receipts and divide the expenses in proportion to the distance stocked by each. When such an arrangement exists, it has frequently been held that any or all of such proprietors can be held liable for all injuries or losses caused by the misconduct or negligence of the persons employed on any part of the line, though such person is employed by the proprietor of only a portion of it.[46]

Sec. 250. (§ 159.) Same subject.—The leading case upon this subject of the joint liability of carriers in this country is that of Champion *v.* Bostwick, which was learnedly argued in both the supreme court[47] and in the court of errors of New York.[48] The defendants ran a line of coaches between Utica and Rochester. The route was divided into three sections, each of the defendants furnishing the coaches, horses and drivers for one of the sections, and paying all the expenses of his section except tolls at the turnpike gates. By an agreement between them, the passage money received by either for transportation over any part of the line constituted a common fund, out of which the tolls on the whole route were first to be paid, and the residue was then

46. Weyland *v.* Elkins, Holt N. P. 227; 1 Starkie, 272; Laughter *v.* Pointer, 5 B. & C. 547; Carter *v.* Peck, 4 Sneed, 203; Cobb *v.* Abbot, 14 Pick. 289; Fromont *v.* Coupland, 2 Bing. 170; Rocky Mt. Mills *v.* Railroad Co., 119 N. Car. 693, 25 S. E. Rep. 854, 56 Am. St. Rep. 682; Eckles *v.* Railway Co., 112 Mo. App. 240, 87 S. W Rep. 99, citing Hutchinson on Carr.

Where, however, no such arrangement is shown to exist, a connecting carrier will not be liable for the default of either the first or any other connecting carrier. Railway Co. *v.* F. W. Stock, — Va. —, 51 S. E. Rep. 161, citing Hutchinson on Carr.

47. 11 Wend. 571.

48. 18 *id.* 175.

to be divided among the owners of the different parts of the line in proportion to the distances run by each, whether such money was received for the transportation over one part of the line or another. This was held in both courts to be such a division of the profits among the proprietors of the several sections as to make them partners, at least as to third persons. But it was said that the case would have been entirely different had the agreement been that each stage owner should receive and retain the money earned on his part of the line and sustain all its expenses, and should act only as the agent of the others in receiving the passage money for them for the transportation over their parts of the line. In such a case, it was said, there would have been no joint interest and no liability as partners to third persons. And so it was expressly decided in the subsequent case of Pattison *v.* Blanchard,[49] in which the agreement between the proprietors of the different portions of the line was, that the money received for the transportation of passengers should be divided in proportion to the length of the route over which they had each transported such passengers, without any allowance or deduction for any expenses incurred upon any part of the line. This being merely a division of the gross receipts without reference to losses, expenses or profits, was held not to constitute such a partnership between the carriers as to create a joint liability, or as to make them separately liable for each other's defaults.

Sec. 251. (§ 160.) Same subject—Actual partnership not necessary.—But the existence of a partnership between different lines of carriers is not essential to the creation of a joint liability, nor is it the test by which such liability is in all cases to be determined. The convenience of commerce makes it frequently necessary to send goods to distant places, which can only be reached by several connecting but independent lines of transportation. This is frequently effected by arrangements between the proprietors of such lines; and when such an arrangement is made, the liability of each line is to be determined by a fair construction of its terms. Sometimes such arrangements

49. 1 Seld. 186.

have been held to constitute partnerships; as where the different lines, or portions of the same continuous line, have agreed to put their earnings into a common fund for division according to distance, expense or amount of investment, or upon some such basis agreed upon between the parties as equitable, as in the cases last cited. Sometimes such arrangements constitute strictly partnerships, whilst in many cases the joint liability is made to depend upon the existence of the relation of principal and agent; and it frequently becomes a question for the nicest discrimination, whether, in the particular case, the carrier who is sued for the loss or damage has, by his contract or association with another in the same business, assumed responsibility for such loss or damage when occasioned by the fault of the latter; and some of the cases upon the subject seem to be decided upon no very definite ground, and are not always reconcilable. Such liability, however, has almost invariably been put either upon the ground of partnership or upon that of agency.

Sec. 252. (§ 161.) Same subject—Cases holding carriers jointly liable.—In Cobb *v.* Abbott[1] a line of stage-coaches was run from Barre to Worcester, through Holden, one of the defendants stocking the road with horses and coaches from Holden to Barre, being two-thirds of the distance, and receiving all the money collected for carriage over that portion of the line; while the other furnished and maintained horses and coaches for the part of the road from Worcester to Holden (the latter being the point at which they connected), and received all the proceeds of the business on that part of the line. They employed a driver for the whole line, the proprietors contributing to his payment in equal proportions. A sum of money having been intrusted by the plaintiff at one end of the continuous line to this driver to be carried to the other, and he having absconded with it, it was held that the two proprietors were jointly liable for the loss. It was said by the court that had the arrangement between the defendants been to divide the profits of the business in proportion to the distance for which each bore the expense of the

1. 14 Pick. 289.

line, there would have been a clear case of partnership. But it was thought that even as it was, the undertaking seeming to have been joint, especially as the driver had been jointly employed, there was enough in the case to hold them jointly liable. "The question is not without difficulty," said Shaw, C. J., "but on the whole we think they must be considered so far jointly concerned as to be jointly liable for the driver's act in this particular instance. They jointly hired him and for a joint object; and the well managing of the business at one end of the line was of importance to the other."

Sec. 253. (§ 162.) Same subject.—In the case of the Cincinnati, Hamilton & Dayton Railroad and Dayton & Michigan Railroad *v.* Spratt,[2] a steamboat line and several railroad lines associated themselves to form a line for the transportation of freight from Louisville to New York via Cincinnati, charging through freight and giving through bills of lading. No partnership was created by the arrangement, though the object was the mutual benefit of all the lines. A quantity of tobacco was delivered upon one of the boats at Louisville for shipment to New York, a through bill of lading was given by their common agent and through freight paid. The tobacco was safely carried to Cincinnati and put upon a wharf-boat of one of the associated lines in charge of its agent, to be sent to the depot of the next carrier of the through line. Whilst there deposited, the tobacco was injured by the sinking of the wharf-boat, and it was held that the several lines thus connected were jointly and severally liable for the loss. "In such cases of associated companies," said Robertson, C. J., "engaged in a common undertaking for transportation on a long line of which each associate owns a different link, public justice and commercial policy require a stringent construction against any intermediate irresponsibility as a common carrier. We are therefore of opinion that the delivery of the tobacco on the wharf-boat was a constructive delivery to appellants for transportation as common carriers."

2. 2 Duvall 4.

Sec. 254. (§ 162a.) Same subject.—In Block *v.* Fitchburg Railroad Company[3] it appeared that the defendant and seven other railroad companies had formed an association under the name of the Erie and North Shore Despatch Fast Freight Line for the transportation of merchandise between Boston and Chicago; that the association had an agent in Boston who was authorized to receive goods at Boston for transportation over the line to Chicago and to give bills of lading in the name of the association, the names of the several railroads not appearing on it; that the plaintiff had delivered goods to such agent for transportation to Chicago, receiving such a bill of lading, and that part of the goods were lost between Boston and Chicago. The action was brought against all of the companies forming the association, and they were held liable. "The defendants," said Morton, C. J., "formed a company, and in its name made a special contract to carry the plaintiff's goods from Boston to Chicago. They are, so far as the plaintiff is concerned, partners, and liable jointly and severally for any loss or damage to his goods between Boston and Chicago, unless they are exempted from liability by the terms of the contract."[4]

Sec. 255. (§ 163.) Same subject.—In Hart *v.* The Railroad Company,[5] where three separate companies owned distinct portions of a continuous railroad line, each company running its cars over the whole road and each accounting to the others in proportion to the distance owned by it, employing the same agents to sell tickets for the whole line and to receive freight or baggage for carriage over the entire route, an action was sustained against one of them for the loss of baggage received

3. 139 Mass. 308.

4. *Citing* Hill Mfg. Co. *v.* Railroad, 104 Mass. 122. See, also, Wyman *v.* Railroad Co., 4 Mo. App. 35.

"It is well settled that where several common carriers, each having its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price which the shipper pays in one sum, and which the carriers divide among themselves, they are jointly and severally liable to the shipper with whom they have contracted for a loss taking place on any part of the whole line." White Live Stock Commission Co. *v.* Railroad Co., 87 Mo. App. 330.

5. 8 N. Y. 37.

at one terminus to be carried over the whole line, although there were separate coupon tickets for each road, and although it was not proven that the baggage ever came into its possession or went upon its car, it being shown that the general agent of the three companies received the baggage and agreed to carry it over the three roads.

Sec. 256. (§ 164.) Same subject—Cases holding carriers not jointly liable.—But in Converse *v.* Norwich, etc. Trans. Co.,[6] where defendants, common carriers by water, made a contract with a railroad company that their boats should run daily in connection with trains upon the railroad; that through freight should be received to be carried at reduced rates, the receipts from which were to be divided between them in certain proportions, and that the railroad company should build a depot and wharf where both companies could transact their business, defendants paying rent for their use of it, it was held that the defendants were only bound to carry to the end of their line and there deliver to the railroad company, and that no joint liability was created.

Sec. 257. (§ 165.) Same subject.—In Gass *v.* The Railroad[7] the defendants were the proprietors of a railroad, connecting with a steamboat company at one end of their road and with another railroad at the other end, the three forming a continuous line of transportation for passengers and freight between New York and Boston. A fixed price was charged for the entire transportation between the two cities, each company receiving an agreed proportion for its share of the service. The goods which were the subject of the suit were received in New York by the steamboat company to be carried to Boston, and the whole amount of the freight bill was to be collected in Boston. It was held that there was no partnership or joint liability.

Sec. 258. (§ 166.) Same subject.—In Briggs *v.* Vanderbilt and Drew,[8] the defendant Vanderbilt was the owner of a line

6. 33 Conn. 166.
7. 99 Mass. 220.
8. 19 Barb. 222.

of steamships plying between New York and the Isthmus of Nicaragua. There was also a steamship line from the Isthmus to San Francisco, in which the defendant Drew was a partner. The two steamship companies had a common agent in New York who sold through tickets to San Francisco, from whom the plaintiff purchased three tickets entitling him to a passage to and across the Isthmus, and thence upon a vessel of which the defendant Drew was half owner to San Francisco. A separate and distinct price was charged for each of these tickets, though the three together were equivalent to one ticket, entitling the plaintiff to a passage to and across the Isthmus to San Francisco; but there was no evidence that the defendants were jointly interested in the price of a ticket for any one of the routes, and the question being whether there was a partnership in the transaction, Strong, J., used the following language: "In that respect this case differs from Champion *v.* Bostwick. In that case the money received on the different routes by the separate owners was to be divided between them in proportion to the number of miles run by each; and it was for that reason held that such owners were jointly liable as co-partners to third persons. But Chancellor Walworth, who gave the only written opinion in the court for the correction of errors, said truly that 'the case would be entirely different if each stage-owner was to receive and retain the passage money earned on his part of the line, and to sustain all the expenses thereof, and was only to act as the agent of the others in receiving the passage money for them for the transportation of passengers over their parts of the line. In that case there would be no joint interest and no liability to third persons as partners.' In this case there were three distinct concerns—on the Atlantic, on the Isthmus, and on the Pacific. There was no joint interest in the passage money; no agreement as to its division or any proportion which each was to receive. Each made its own charge, not dependent in any manner upon the others, and there was no agreement to share any profit or loss. There was not, therefore, any partnership. . . . They had, it is

true, the same agent, but he acted in his vicarious capacity separately for each."[9]

Sec. 259. (§ 166a.) Same subject.—In Insurance Company *v.* Railroad Company,[10] it appeared that a contract existed between a corporation known as the Erie & Pacific Dispatch Company on the one part, and the defendant railroad company on the other part, whose road, in connection with other roads, formed a continuous line to New York, that the defendant should "receive, load and unload, deliver and way-bill" all freight sent to it by the dispatch company at such rates for transportation as might be established by the railroad companies, and should, while assuming all the risks of a common carrier, pay for all damage or loss of property while on its line of road or in its possession. A similar contract was entered into by the dispatch company with each of the other railroad companies, between which there was an arrangement that the amount charged for the through freight should be divided between them according to the length of their respective roads; that each company should pay for losses occurring on its road; and that on such freight the last carrier should collect the charges from the consignee, deduct its share thereof, account in the same way to the next company, and so on to the first. Settlements were to be made by the railroad companies periodically upon accountings between them, and each settled separately with the dispatch company, paying it a certain percentage on the business for its compensation. Upon this state of facts it was held by the supreme court of the United States that the defendant railroad company, by its agreement with the dispatch company, incurred neither an obligation to carry freight beyond its own road nor a liability for the negligence of the other companies; and that the arrangement between the railroad companies did not make them partners, either *inter sese* or as to third persons.[11]

9. In connection with this case see Swift *v.* Steamship Co., 106 N. Y. 206, 12 N. E. Rep. 583.

10. 104 U. S. 146.

11. See, also, Citizens' Ins. Co. *v.* Kountz Line, 4 Woods, 268; Milne *v.* Douglass, 4 McCrary, 368; Deming *v.* Railroad Co., 21 Fed. Rep. 25.

Sec. 260. (§ 167.) Same subject.—In Ellsworth *v.* Tartt[12] plaintiff purchased a through passenger ticket over two connecting lines of stage-coaches, in one of which only was the defendant interested, there being no proof of any community of interest in the property or profits of the two lines. Each proprietor was, however, to be paid out of the money received for the through ticket. The plaintiff's baggage was lost, but not, as it appeared, upon the defendant's part of the line; and it was held that the agreement by the defendant with the other proprietors to receive fare for his part of the route, out of the money paid to a common agent for selling through tickets, would not, in any sense, make him a participant in the profits of the entire route nor liable to third persons as a partner. "Suppose," said Goldthwaite, J., "the different proprietors along the route came to the understanding to appoint a common agent at each end to receive the fare of each from passengers going through and to give a receipt or through ticket; it is very clear that such an agreement would not constitute a partnership *inter se* or as to third persons, and yet each proprietor would have the right to receive his proportion of the fare; there would be in such a case no community of interest either in the property or the profits.[13]

Sec. 261. (§ 168.) Same subject.—But in the case of Carter & Hough *v.* Peck,[14] the defendants Carter & Hough, being the owners of a line of stage-coaches from Nashville to Waynesboro, made an arrangement with the proprietors of another line from the latter place to La Grange, that passengers purchasing through tickets from Nashville to La Grange should be carried the entire distance by the two lines. The plaintiff having purchased a through ticket was carried safely and in due time by the defendants to the end of their portion of the route,

12. 26 Ala. 733.

13. And see, following and approving this case, and stating the general rule in this country to be that in the absence of a special contract or of some relation between carriers having control of different parts of a line or route of transportation, each carrier is liable only for a loss of, or injury to, the goods on his particular line or route, Montgomery, etc. R. R. Co. *v.* Moore, 51 Ala. 394.

14. 4 Sneed 203.

but the other company with whom the arrangement for through transportation had been made failed, from the insufficiency of its means of conveyance, to carry him forward as he was entitled to be carried by his contract; whereupon he hired another conveyance for the prosecution of his journey and sued the first company which had not been in fault, in an action for damages, and it was held that having assumed to carry the plaintiff to a certain destination, they were responsible for the undertaking and liable for the failure of the connecting company. No reference is made in the case to the manner in which the price of the ticket was to be divided between the proprietors of the two lines, and it was said to be wholly immaterial whether the plaintiff knew or not of the fact of the existence of the two lines and of the arrangements between them. The through ticket was a contract for the entire transportation, and made the defendants responsible for its breach no matter by whose fault occasioned. Nothing was said as to the liability of the defaulting carrier, as he was not sued. But as the contract was made by his authority, there would seem to be no question but that he would have been held liable as a party to the contract.[15]

15. See, also, upon the subject of the liability of carriers for the defaults of other connecting or associated carriers, Judson *v.* The Railroad, 4 Allen, 520; Straiton *v.* The Railroad, 2 E. D. Smith, 184; Hood *v.* The Railroad, 22 Conn. 1; Bowman *v.* Hilton, 11 Ohio, 303; Ricketts *v.* The Railroad, 4 Lans. 446; Harp *v.* The Grand Era, 1 Woods' Ct. Ct. R. 184; Barter *v.* Wheeler, 49 N. H. 9; Fairchild *v.* Slocum, 19 Wend. 329; *s. c.* 7 Hill, 292; Hartan *v.* The Railroad, 114 Mass. 44; Washburn Manufg. Co. *v.* R. R. 113 *id.* 490; Croft *v.* The Railroad, 1 MacArthur, 492; Skinner *v.* Hall, 60 Me. 477; Wilson *v.* The Railroad, 21 Gratt. 654; Darling *v.* The Railroad, 11 Allen, 295; Burroughs *v.* The Railroad, 100 Mass. 26; Milnor *v.* The Railroad, 53 N. Y. 363; Brooks *v.* The Railway, 15 Mich. 332; Lock Company *v.* The Railroad, 48 N. H. 339; Gray *v.* Jackson, 51 *id.* 9; Fitchburg, etc. R. R. *v.* Hanna, 6 Gray, 539; Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189; Hempstead *v.* The Railroad, 28 Barb. 485; Baltimore, etc. R. R. *v.* Wilkins, 44 Md. 11; Phifer *v.* Railroad Co., 89 N. C. 311; Lindley *v.* Railroad Co., 88 N. C. 547; Phillips *v.* Railroad Co., 78 N. C. 294; Railroad Co. *v.* Dupont, 128 Fed. 840, 64 C. C. A. 478.

In the absence of any special contract or partnership between two connecting carriers, the mere

Sec. 262. Same subject—Effect of establishing joint or through rates.—Where several connecting carriers establish and publish joint or through rates, that fact alone will be insufficient to impose upon them a joint liability or render one of them responsible for the acts or omissions of the others. The first carrier under such an arrangement is, at most, the agent of each of the other carriers for the purpose of contracting for carriage over its route, and it will be the duty of each succeeding carrier to receive the goods at the point where the preceeding carrier's line ends and carry them to its own terminus. But neither the first nor any succeeding carrier will be considered as thereby assuming responsibility for the goods after a delivery has been made to the next carrier in the route.[16]

Sec. 263. (§ 169.) Same subject—The rule stated.—From these cases it may be deduced: First. That where carriers over different routes have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or of the receipts from it after deducting any expenses of the business, they become jointly liable as partners to third persons; but that, where the agreement is that each shall bear the expenses of his own route and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither *inter se* nor as to third persons, and incur no joint liability.[17] Secondly. That, where they jointly employ a common agent in the prosecution of a joint enterprise as carriers, they become jointly

fact that the first carrier sells a ticket to a point on the other carrier's line will not make the second carrier liable for the loss of a passenger's trunk before the same has been delivered to it. Romero *v.* McKernan, 88 N. Y. Supp. 365.

16. Wehmann *v.* Railway Co., 58 Minn. 22, 59 N. W. Rep. 546.

17. This statement of the rule is approved in Peterson *v.* Railway Co., 80 Iowa, 92, 45 N. W. Rep. 573. An advertisement by a railroad company that it runs trains or connects with trains of other companies so as to form through lines without breaking bulk or transferring passengers tends to show no contract or agreement between the companies to share profits and losses. Railroad Co. *v.* Jones, 155 U. S. 333, 15 Sup. Ct. R. 136.

liable for his defaults,[18] but do not become responsible for each other's acts merely by reason of the employment of such common agent. Nor will a contract for through transportation over their several lines made by him, although authorized by an arrangement between them, create a joint liability or a liability for the defaults of each other, it not being shown that such companies were jointly interested in the expenses of the transportation. Thirdly. That, in order to hold one carrier responsible for the defaults of another, a partnership between them must be shown, either express or implied, from the circumstances; or it must appear that the one was acting in the transportation as the agent of the other against whom the recovery is sought; and that the mere employment of a common or joint agent with authority to contract for through transportation over connecting routes, under an arrangement for the division of the receipts for such transportation in proportion to distance or other service, will generally constitute neither such a partnership nor agency, each for the other, as will make them jointly liable or liable for each other's acts in the transportation.[19]

18. See, Kansas City, etc. R'y Co. *v.* Embrey, — Ark. —, 90 S. W Rep. 15.

19. In Gulf, etc. R'y Co. *v.* Baird, 75 Tex. 256, it is said: "If the Louisville & Nashville Railway Company (the first carrier) had not authority, by virtue of the existence of a partnership between itself and the other lines over which the cattle were to pass, or by virtue of an agency conferred on it by the other companies empowering it to make a contract which would bind them jointly, then the contract was simply the contract of the company that made it, by which it was bound to transport the cattle on its own line as far as that extended, and beyond that to furnish transportation through other lines.

"In the absence of proof of express authority, facts may be shown which will be sufficient to authorize a jury to find that the power actually existed.

"A railway company cannot be held to have ratified a contract from the fact that it performed some of the services contemplated by it, when it is not at liberty, contract or no contract, to refuse to render the service. At the time the cars in which appellee's cattle were received by appellant, the law provided that 'every such company shall for a reasonable compensation draw over their railroad without delay the passengers, merchandise and cars of

Fourthly. That carriers, like other persons, may become liable for each other's acts as partners to third persons who may have sustained injuries through their defaults or misfeasances, when as between themselves there is no partnership nor mutual responsibility.[20]

Sec. 264. (§ 170.) Partnerships between corporations as carriers.—The same rules in regard to partnerships and other contracts and associations between carriers will govern, when the connecting lines are railroad companies or other incorporated bodies, whenever the rights of third parties who have contracted with them require that such partnerships or associations shall be upheld, however it may be when the question is between the corporations themselves. It is true that it has been held that two distinct and separate railroad corporations have no right to consolidate and conduct their business under the same management as a partnership;[21] but this was a case between the assignee of certain promissory notes, given in the name assumed by the two companies after the consolidation and the two original contracting companies, and it is probable that if the contracting companies had confined themselves in their association strictly to the purposes for which they had been incorporated, the decision would have been different, upon that general

every other railroad which may enter and connect with their railroad.'

"In the face of such legislation, the evidence should show something more than that a through shipment was made, that a price was fixed for the entire transportation and collected by the last carrier, before it ought to be held that this was a joint contract for transportation that would render each carrier liable for failure of duty on the part of other carriers in the connected lines." This case was followed in Fort Worth, etc. R'y Co. *v.* Williams, 77 Tex. 121.

The fact that each road sells through tickets and takes its own share of the price according to its mileage does not constitute them partners. Railroad Co. *v.* Mulford, 162 Ill. 522, 44 N. E. Rep. 861, 35 L. R. A. 599.

A mere traffic arrangement between connecting carriers for a division of receipts on the profits of transportation will not create a joint contract or partnership between them. Wilson *v.* Railroad Co., 92 N. Y. Supp. 1091.

20. Champion *v.* Bostwick, 11 Wend. 571, 18 *id.* 175; Pattison *v.* Blanchard, 1 Seld. 186.

21. Pearce *v.* Railroad Co., 21 How. 441.

principle in reference to corporations, that where their charters are silent as to what contracts they may make, they have power to make all such as are necessary or usual in the course of their business as means to enable them to attain the objects for which they are created. And in those cases heretofore referred to in which it has been held that a railroad or any other incorporated carrier may contract to carry beyond the limits of its line as fixed by its act of incorporation, such contracts have been mainly upheld upon the argument that, whether such contracts were strictly *ultra vires* or not, as to third persons so contracting with the carrier they were valid.[22] Reasoning by analogy, it would be equally plain that wherever the rights of parties employing the carrier require the enforcement of a joint liability arising from such associations, they will be held to have been validly formed; and as to the public, however it may be between the companies themselves, all duties and obligations growing out of them will be enforced. Such has been, tacitly at least, conceded to be the law in the great number of cases which have come before the courts involving such arrangement between connecting and associated lines of carriers.[23]

22. See cases cited *ante*, § 242.

23. In a New York case it is said that the power of corporations to become joint carriers has never been denied but has frequently been recognized. Swift *v.* Steamship Co., 106 N. Y. 206, citing Aigen *v.* Railroad Co., 132 Mass. 423; Block *v.* Railroad Co., 139 Mass. 308; Gass *v.* Railroad Co., 99 Mass. 220; Hot Springs R. R. *v.* Trippe, 42 Ark. 465; Insurance Co. *v.* Railroad Co., 104 U. S. 146; Barter *v.* Wheeler, 49 N. H. 9; Wylde *v.* Railroad Co., 53 N. Y. 156.

If two railroad corporations cooperate in the management of a railway without authority of law, they will be none the less liable for injuries resulting through their negligence in the management of the road. Railroad Co. *v.* Meyers, 62 Fed. 367, 10 C. C. A. 485, 18 U. S. App. 569.

If a corporation permits another company to use its corporate name and hold itself out to the general public as transacting the business of a common carrier, it will be liable as a common carrier to those who in good faith deal with it as such. Reed *v.* Steamboat Co., 1 Marr. (Del.), 193, 40 Atl. Rep. 955.

Although a railroad company may be a legal entity separate and distinct from a second rail-

road company, if it sustains toward the second company the relation of a dummy more nearly than that of an independent, self-governing company, and its corporate existence is maintained by and for the use of the second company and it is held out to the general public as a part of such company's system, the second company will be responsible to third persons who are injured by the former company's acts. Railroad Co. *v.* Anoka Nat'l Bank, 108 Fed. 482, 47 C. C. A. 454.

CHAPTER VI.

OF THE CARRIER'S LIABILITY AND THE EXCEPTIONS THERETO BY LAW.

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I. IN GENERAL.

Sec. 265. (§ 170a.) The liability of the carrier by law.—The liability of the common carrier by law is, as has been seen, an unusual and extraordinary one, based upon considerations of public policy which have survived the wonderful change in the circumstances under which they first arose. By that law the common carrier is regarded as a practical insurer of the goods against all losses of whatever kind with the exception of (1) those arising from what is known as the act of God, and (2) those caused by the public enemy; to which in modern times have been added (3) those arising from the act of the public authority, (4) those arising from the act of the shipper, and (5) those arising from the inherent nature of the goods.

Sec. 266. (§ 171.) Carrier may by contract assume more than legal liability.—As a carrier may, as will be hereafter seen, to some extent restrict his liability within narrower limits than are prescribed by the law in the absence of express contract, so he may enlarge it so as to waive this limited protection which the law has always afforded him. But this must be done by clear and precise language; for the law will not imply from any doubtful language such an intention, but will rather presume, where the meaning of the contract is doubtful, that it was not his intention to waive a protection so reasonable and so important to him. Express language will be required to impose upon a party the responsibility of an insurer beyond his legal obligation, or to prevent the operation of the customary rule in

cases where the act of God or inevitable accident excuses the non-performance of a contract.

Sec. 267. (§ 172.) Same subject—Contract must be express.—In Price *v.* Hartshorn[1] the contract of the carrier was "to deliver without delay, damage or deficiency in quantity to be deducted from charges by consignees." It was contended that this contract, in the absence of words limiting his liability or reserving the benefit of the exceptions which the law made in his favor, was a contract to be liable at all events, and that he was therefore liable even for a loss which had occurred by the act of God; but the court, while admitting that it was competent for him to increase his legal obligation, held that it could not be concluded from this language that he had intended to do so, and that the contract, to have this effect, must be in direct and positive terms, and must show a clear purpose to add to his ordinary liability. So in Gage *v.* Tirrell,[2] the carrier gave a bill of lading which contained no exception to his liability from any cause except the perils of the sea, and it was contended, as in the previous case, that *expressio unius* being *exclusio alterius,* this was a contract to assume all risks, even from the acts of God or the public enemy; but this was denied to be its effect by the court, and it was said that whilst the maxim *expressio unius exclusio alterius* generally furnished a sound rule by which to arrive at the intention of the parties to contracts, it was one to be applied with caution, and that it could not be concluded from such an argument that the carrier intended to divest himself of the protection which the law had given him. It was said, however, that had the exception in the contract been of one of those perils against which the law protected the carrier, instead of against the perils of the sea against which it did not protect him, its conclusion might have been different.[3]

Sec. 268. (§ 173.) Purpose of this chapter.—But where the carrier has not in any way enlarged his legal responsibility, he

1. 44 Barb. 655; 44 N. Y. 94.
2. 9 Allen, 299.
3. See Strohn *v.* Railroad, 23 Wis. 126; Morrison *v.* Davis, 20 Penn. St. 171; Redpath *v.* Vaughn, 52 Barb. 489.

may always show that the loss or damage has been caused by the act of God or the public enemy, and thus escape from liability.[4] It therefore becomes a matter of importance to determine what is meant by the words "the acts of God" in this connection, and who are to be regarded as public enemies in the sense in which the words are to be understood when thus used. It may be observed, however, that the instances for the application of these exceptions have become much less frequent in more recent times, owing to the almost universal practice which now prevails of providing by contract the extent of the responsibility which the carrier shall assume.

It is also important to consider what other limitations, if any, the law attaches to the liability of the carrier in the absence of a contract limiting it, and it is the purpose of the present chapter to consider this subject, the question of contract limitations being reserved for the succeeding chapter.

II. CARRIER NOT LIABLE FOR LOSSES ARISING FROM THE ACT OF GOD.

Sec. 269. (§ 174.) What is meant by the "acts of God."— The words "the acts of God" have been the subject of much comment, in some of the cases in which carriers have endeavored to protect themselves against liability for losses caused by accidents or occurrences which they claimed to have been the acts of God. Perhaps no subject could open a wider field for theological and speculative discussion than the question what are and what are not the acts of God. In one sense it may be said that all events may be attributed to His agency; but this is by no

4. But where the carrier has contracted to furnish cars at a certain time and place, he cannot escape liability by insisting that an act of God rendered a performance of the contract impossible; nor will the fact that the owner of the goods knew at the time the contract was entered into that it would be impossible for the carrier to comply with its terms relieve the carrier from liability for its non-performance. Collier *v.* Swinney, 16 Mo. 484; Myres *v.* Diamond Joe Line, 58 Mo. App. 199.

means the sense in which the phrase is to be legally understood; and it can never become necessary, so far as the question of the liability of the carrier is concerned, to discuss so abstract a proposition, because the exception to his liability intended by these words has by a long course of almost concurrent adjudication received a tolerably fixed and definite but limited meaning.

Sec. 270. (§ 175.) Same subject—Conflict in authorities.—Still, the authorities do not entirely agree as to what causes of a natural and unexpected kind are to be embraced within the exception. Some extend its meaning so as to include hidden and unknown obstructions unexpectedly thrown in the way of the carrier by natural causes; and, when the carriage is by water, even to such as are of a permanent kind but hitherto unknown to navigators. These authorities assimilate the acts of God to inevitable or unavoidable accident, when such accident is in no way attributable to human agency nor to the fault or negligence of the carrier; and according to this view of the subject, if the occurrence be one produced by natural causes without the intervention of man, whether such causes be passive or active, and neither negligence nor the want of skill on the part of the carrier has concurred to produce the result, he will be excused. It is to be regarded, it is said, as one of those misfortunes against which no skill or watchfulness on his part could have guarded, and as no human agency has brought it upon him, it must be referred to that inevitable necessity, the *vis major,* which is the act of God. As where a freshet has lodged a snag in the usual channel of a river, and a vessel, following this channel as it had been used to do, strikes upon this snag.[5] Or where the obstruction was a hidden rock in the sea, not before known to navigators and not known to the master of the vessel.[6] And with this view of the subject would seem to agree our most eminent text-writers.[7]

5. Smyrl *v.* Niolon, 2 Bailey, 421; Faulkner *v.* Wright, Rice, 107.

6. Williams *v.* Grant, 1 Conn. 487. The doctrine of this case is denied in Friend *v.* Woods, 6 Gratt. 189.

7. Story on Bail. §§ 489, 490, 511; 2 Kent's Com. 597. And see Hays *v.* Kennedy, 41 Penn. St.

Sec. 271. (§ 176.) Same subject.—Other authorities, however, restrain the meaning of the exception within narrower limits, and require that the inevitable necessity, to come within the meaning of the phrase "the act of God," must arise from some violent disturbance of the elements, such as a storm or tempest, an earthquake, lightning, floods, or the like, which must be the immediate cause of the disaster; and according to them, to be the act of God, it must not only be an extraordinary violence of nature, but it must be of so stupendous a character that no act of man can do anything to avoid it. They deny, therefore, that losses arising from accidents attributable to existing obstructions, whether of old or recent date and no matter how produced, or to causes brought about by quiet changes in the physical world, no matter how sudden, can be claimed to be the acts of God which will excuse the carrier; for these, not being in their own nature and inherently agents of mischief and causes of danger, the loss, when it occurs by reason of them, must necessarily have sprung, in part at least, from human agency.[8]

Sec. 272. (§ 177.) The rule in Colt v. McMechem.—One of the earliest cases in this country involving this question was that of Colt *v.* McMechen,[9] in which the proof was that the vessel was sailing close to shore under a light wind, which, had it not sud-

378. In this case, Lowrie, C. J., learnedly reviews the authorities upon the subject as well as the history of the words "the acts of God," and shows that previous to the decision of Lord Mansfield in Forward *v.* Pittard they were used in the sense of something inevitable in the course of nature, and that the narrower signification claimed for them in modern cases, especially in their application to carriers, was first introduced by that decision in 1785.

8. For cases involving losses from the act of God, see Packard *v.* Taylor, 35 Ark. 402; Gillespie *v.* Railway Co., 6 Mo. Ap. 554; Davis *v.* Railroad Co., 89 Mo. 340; Haas *v.* Railroad Co., 81 Ga. 792; Norris *v.* Railway Co., 23 Fla. 182; Slater *v.* Railway Co., 29 S. C. 96; Hibernia Ins. Co. *v.* Transportation Co., 120 U. S. 166; Gleeson *v.* Railroad Co., 5 Mackey, 356, 140 U. S. 435; Strouss *v.* Railway Co., 17 Fed. Rep. 209; The Majestic, 166 U. S. 375, 17 Sup. Ct. R. 597, 41 L. Ed. 1039, *reversing* Potter *v.* The Majestic, 60 Fed. 624, 9 C. C. A. 161, 20 U. S. App. 503, 23 L. R. A. 746; *s. c.* 56 Fed. 244, 69 Fed. 844.

9. 6 Johns. 160.

denly failed, would have carried her safely; but suddenly failing, the vessel ran aground and the goods of plaintiff were thereby injured. The opinion of the court was delivered by Spencer, J., with whom a majority of the court agreed. "Upon a position so plain in my apprehension," said he, "as that the sudden cessation of a wind which was competent, at the very moment when the vessel began to come about, for the avoidance of the shoal, was the act of God and did not arise from the fault or negligence of man, I am at a loss for further illustration." But Kent, C. J., dissented, saying: "I concur in the general doctrine that the sudden failure of the wind was the act of God. It was an event which could not happen by the intervention of man nor be prevented by human prudence. But I think there was a degree of negligence imputable to the master, in sailing so near the shore under a light, variable wind, that a failure in coming about would cast him aground. He ought to have exercised more caution and guarded against such a probable event, in that case, as the want of wind to bring his vessel about. A common carrier is only to be excused from a loss happening in spite of all human effort and sagacity."

Sec. 273. (§ 178.) Same subject.—Of this decision it has been said that it may be fair divinity, and that upon such a philosophical theory of causation everything may be the act of God; but that it is the most extraordinary version of the principle on which a common carrier is discharged from liability that the books contain, and that upon the authority of later cases it may be confidently pronounced to be wrong.[10] But if a sudden gust of wind is the act of God when it causes the loss, as was held by Lord Mansfield,[11] it would seem too plain for argument that its sudden cessation was due to the same cause, and that if the physical effect were the same, so should be its legal effect, aside from any negligence or want of precaution on the part of the carrier. And it would be difficult to distinguish the difference in legal effect between losses occurring from such

10. Am. Notes to Coggs *v.* Bernard, Smith's Ld. Cas. p. 317.

11. Amies *v.* Stevens, 1 Strange, 128.

causes, and those occasioned by the freezing up of canals and rivers, which has been repeatedly held to be the act of God which will exonerate the carrier where no fault is imputable to him.[12]

Sec. 274. (§ 179.) Act of God must be proximate cause of loss.—All the authorities, however, agree that the act of God, to excuse the carrier, must be the proximate cause of the loss;[13] for the very definition, as given by Lord Mansfield in Forward *v.* Pittard,[14] of the act of God is, that it is something in opposition to the act of man. If, therefore, another agency than that which may properly be referred to as an act of God intervenes to produce the misfortune, the act of God will no longer be considered the proximate cause of the loss, and the carrier cannot relieve himself from liability by pleading it as an excuse.[15] This is illustrated by the case of Smith *v* Shepherd,[16] which was an action brought against the defendant as the master of a vessel, and it appeared that at the entrance of the harbor of Hull there was a bank on which vessels used to lie in safety, but a part of which had been swept away by a great flood some time before the misfortune in question, so that it had become perfectly steep instead of shelving towards the river as formerly; that a few days after this flood a vessel sunk by getting on the bank, and her mast, which was carried away, was suffered to float in the river tied to some part of the vessel, and that the defendant, upon sailing into the harbor, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck and would have remained safe had the bank been in its former situation; but on the tide ebbing, her stern

12. Bowman *v.* Teall, 23 Wend. 306; Parsons *v.* Hardy, 14 *id.* 215; Harris *v.* Rand, 4 N. H. 259; Crosby *v.* Fitch, 12 Conn. 410; Spann *v* Transportation Co., 11 Misc. Rep. 680, 33 N. Y. Supp. 566.

13. Hart *v.* Allen, 2 Watts, 114; Ewart *v.* Street, 2 Bailey, 157; King *v* Shepherd, 3 Story, 349; Siordet *v.* Hall, 4 Bing, 607; Railroad Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. Rep. 462.

14. 1 T. R. 33.

15. See Railroad Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. Rep. 202, citing Hutchinson on Carr.; Jones *v.* Railroad Co., 91 Minn. 229, 97 N. W. Rep. 893, 103 Am. St. Rep. 507.

16. Abbott on Shipping, p. 383.

sank into the water and the goods on board were spoiled. Proof that there was no actual negligence, which was offered by the defendant, was rejected because, it was ruled, the act of God which could excuse the defendant must be immediate, but this was too remote.

Sec. 275. (§ 180.) Same subject—Human agency must not have intervened.—But while the carrier will be relieved from liability for losses arising from an act of God, it is universally conceded that in order that he may avail himself of this exception to his liability, human agency must not have intervened.[17]

17. Mershon *v.* Hobensack, 2 Zab. 372; Backhouse *v.* Sneed, 1 Murphy, 173; Ewart *v.* Street, 2 Bailey, 157; McArthur *v.* Sears, 21 Wend. 190; The Majestic, 166 U. S. 375, 17 Sup. Ct. R. 597, 41 L. Ed. 1039.

In the case of Nugent *v.* Smith, L. R. 1 Com. Pleas Div. 19, Brett, J., stated the rule to be that the act of God, to excuse the carrier, must be some irresistible violence or convulsion of nature against which he could, by no possible means, have guarded or preserved the goods; and that, when overtaken by such overwhelming power, it became his duty to use every possible means to avoid the loss and to save the goods. This, however, was held by Blackburn, C. J., and the other judges in the court of appeal, to have been erroneous, in requiring too much of the carrier when overtaken by the danger; and upon the subject of what was meant by the term "the act of God," the learned chief justice said: "It is obvious, as was pointed out by Lord Mansfield in Forward *v.* Pittard, 1 T. R. 27, that all causes of inevitable accident (*casus fortuitus*) may be divided into two classes — those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term 'act of God' to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term 'act of God' is properly applicable. On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the 'act of God,' that it necessarily follows that the carrier is entitled to immunity. The rain which fertilizes the earth and the wind which enables the ship to navigate the ocean are as much within the term 'act of God' as the rainfall which causes a river to burst its banks and carry destruction over a whole district or the cy-

An illustrative case is that of Merritt *v.* Earle.[18] There a steamer was sunk by running upon the mast of a sloop that had been sunk in a squall of wind a day or two previously; and although the sloop had been sunk by the violence of the wind, yet that, it was said, was but the remote cause of the loss of the steamer. It was also said that human agency had intervened in the case by placing the sloop in the position by which she was overtaken by the wind, and it was accordingly held that upon both grounds the accident did not come within the meaning of the term, the act of God. So where the defendant's vessel was sunk by being driven against a concealed anchor in the river, to which no buoy was attached, it was held by Mansfield, Buller and Ashurst, JJ., that the carrier was liable.[19]

Sec. 276. (§ 180a.) Same subject.—So in Packard *v.* Taylor[20] it appeared that a boat, which had been injured by a snag, on reaching port had had a dock run under her and holes were cut for the insertion of new timbers, the boat being fastened to the dock by chains. While in this position the boat was loaded.

clone that drives a ship against a rock and sends it to the bottom. Yet the carrier who, by the rule, is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect the goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If, by his default in omitting to take the necessary care, loss or damage ensues, he remains responsible, though the so-called 'act of God' may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered; if the carrier, by undue deviation or delay, exposes himself to the danger which he otherwise would have avoided, or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception. This being granted, the question arises as to the degree of care which is required of him to protect him from liability in respect of loss arising from the act of God."

18. 29 N. Y. 115; *s. c.* 31 Barb. 38.

19. Trent Navigation Co. *v.* Wood, 3 Esp. 127.

20. 35 Ark. 402.

A "small whirl of wind" coming up, the chain was broken and the boat slipped off the dock into the water and the goods were injured. It was held that the carrier was liable. "The act of God," said the court, "which shook the dock from under the vessel was not the immediate cause of the damages. It was the holes in the vessel admitting torrents of water as soon as it touched the surface."

Sec. 277. (§ 180b.) Same subject.—But in Blythe *v.* Railway Co., where an express car, having in it a coal fire burning in a stove and a lighted lamp, was blown from the track by a sudden gale of wind and overturned, and, with the contents, immediately consumed by fire which ensued, it was held that the act of God was the proximate cause of the loss and not the alleged negligence of the carrier's servants in not rescuing the goods, it appearing that any attempt to preserve them would have been unavailing.[21]

Sec. 278. (§ 181.) Same subject—Prudence or mistaken judgment no excuse.—And whenever the carrier is placed in a situation in which it becomes necessary for him to exercise his skill or judgment, no matter what may be the circumstances of danger or difficulty, he takes the risk of their proper exercise; and if there be a way or the means of escape, and he, by losing his presence of mind or by mistaking one object for another, is thereby misled, or shows a want of the necessary skill and judgment, whereby a loss occurs, he is responsible. In McArthur *v.* Sears,[22] which is an exceedingly instructive case upon this subject, the vessel approached the harbor of Erie at night, in hazy and snowy weather, which made it difficult to see the beacon light by which it should have been guided. Another light close by was also visible, which the master mistook for the beacon light, on account of which the vessel was turned from its proper course and struck upon a shoal, which made it necessary to throw the goods overboard. It was proven that the master was one of the most competent masters of steamboats on the lake, and that the most prudent master might have

21. 15 Colo. 333. 22. 21 Wend. 189.

run his boat ashore under the circumstances. Cowen, J., in giving the judgment of the court, said: "I have sought in vain for any case to excuse the loss of the carrier, where it arises from human action or neglect, or any combination of such action or neglect, except force exerted by a public enemy. No matter what degree of prudence may be exercised by the carrier and his servants, although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet, if it be the result of human means, the carrier is responsible. . . . I believe it is a matter of history that inhabitants of remote coasts, accustomed to plunder wrecked vessels, have sometimes resorted to the expedient of luring benighted mariners by false lights to a rocky shore. Even such a harrowing combination of fraud and robbery would form no excuse. . . . The difficulty returns therefore; if we receive the immediate agency of third persons in any shape, we open the very door for collusion which has denied an excuse by reason of theft, robbery and fire."

Sec. 279. (§ 182.) Loss by fire, explosion or collision.—Loss by fire, unless it be caused by lightning, does not come within the exception, because it can originate in no other way so as to be fairly called the act of God. This was decided by Lord Mansfield in the case of Forward *v.* Pittard,[23] in a case of great hardship to the carrier. A wagoner had received the goods for carriage upon his wagon and had placed it, securely as he thought, under shelter, until the time should arrive for his departure with it. In the meantime, a fire originated at a considerable distance from it, but spread so rapidly that before the wagon could be removed it was reached by the flames and burned. In giving judgment in the case Lord Mansfield said: "The question is whether the common carrier is liable in this case of fire. It appears from all the cases for a hundred years back that there are events for which the carrier is liable independent of his contract. By the nature of his contract he is liable for all due care and diligence, and for any negligence he is suable on his contract. But there is a further degree of re-

23. 1 T. R. 33.

sponsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. . . . In this case it does not appear but that the fire arose from the act of some man or other. It certainly did arise from the act of man, for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable for inevitable accident."[24]

Sec. 280. (§ 183.) Same subject.—In Miller *v.* Steam Navigation Company,[25] the carrier had deposited the goods upon a float or floating warehouse for further transportation by another carrier. A fire broke out a quarter of a mile distant, and very soon afterwards a gale of wind suddenly sprung up and blew the fire in the direction of the float, which, in a few minutes, it reached, and the goods were consumed by it. There was no evidence to show how the fire originated. It was therefore presumed to have arisen from some act of man, and the carrier was held liable.[26] In a very similar case, however, arising in Pennsylvania, the carrier was excused.[27] And so where a sudden gale blew a car from the track, upsetting it, and a stove which it contained set fire to its contents, it was held that the carrier was not liable.[28]

Sec. 281. (§ 184.) Same subject—Same rule applies to carriers using steam.—The same rule as to the carrier's liability for losses by fire applies as well in cases of vessels or other vehicles propelled by steam as in other cases, although it has been argued that inasmuch as the use of fire is required to impel them, the same rule should not be applied to them as to vessels which sail by the wind, and that the carrier by steam vessels

24. Hibler *v.* McCartney, 31 Ala. 502; Mershon *v.* Hobensack, 2 Zab. 372; Gilmore *v.* Carman, 1 Sm. & M. 279; Hollister *v.* Nowlen, 19 Wend. 234; Condict *v.* Railway, 54 N. Y. 500; Am. Trans. Co. *v* Moore, 5 Mich. 368; York Company *v.* The Railroad, 3 Wall. 107.

25. 10 N. Y. 431; *s. c.* 13 Barb. 361.

26. See, also, Niblo *v.* Binse, 44 Barb. 54; Moore *v.* Railroad, 3 Mich. 23; Cox *v.* Peterson, 30 Ala. 608; Chevallier *v.* Straham, 2 Tex. 115; Hyde *v.* Trent, etc. Nav. Co., 5 T. R. 389.

27. Pennsylvania R. Co. *v.* Fries, 87 Penn. St. 234.

28. Blythe *v.* Railway Co., 15 Colo. 333.

should no more be held liable for accidents by fire by which his vessel and the goods he carries may be consumed than for the destruction occasioned by a tempest. But this argument seems to have had no weight with the courts, and it has been often decided that the fact that the carrier employs the agency of steam upon his vessel will furnish him with no excuse for losses by fire, and that, unless he has protected himself by his contract, his liability will be the same for such losses as that of the carrier by any other mode.[29] Nor will the explosion of a boiler, any more than a fire, be regarded as an act of God which will excuse him.[30] Nor can a collision be claimed as the act of God; for no collision upon land can take place without the direct intervention of man, and if happening between vessels at sea in a tempest which made it inevitable, the tempest would be the *vis major* and not the collision.[31]

29. Patton *v.* Magrath, 21 Dudley, 159; Spindler *v.* Hilliard, 2 Rich. 286; Singleton *v.* Hilliard, 1 Strob. 203; New Jersey S. N. Co. *v.* Merchants' Bank, 6 How. 344; Hale *v.* The N. J. S. N. Co., 15 Conn. 539; Garrison *v.* The Memphis Ins. Co., 19 How. 312; The Northern Belle, 9 Wall. 526; Caldwell *v.* The N. J. S. B. Co., 56 Barb. 425.

30. Bulkley *v.* The Naumkeag S. C. Co., 24 How. 386, *s. c. nom.* The Bark Edwin, 1 Sprague's Dec. 477; The Mohawk, 8 Wall. 153; Caldwell *v.* The N. J. S. B. Co., *supra.*

31. A loss by collision could not, at least according to the authorities which give the narrower meaning to the terms "the acts of God," excuse the carrier, because such an accident is always caused by the instrumentality of man, except perhaps when unavoidably happening in a storm at sea, when the loss would be attributed to the storm as the *vis major* and thus come within the exception, as in Amies *v.* Stevens, 1 Strange, 128, where the hoy, being driven by a gust of wind against the pier of a bridge and thereby sunk, the loss was attributed to the gust of wind and not to the obstruction which was the work of man, and the carrier was therefore excused. But a case of that kind could scarcely occur in river navigation, and it has been held that collisions occurring upon them cannot be called the acts of God. Mershon *v.* Hobensack, 2 Zab. 372; Plaisted *v.* The Navigation Company, 27 Me. 133. This seems, however, not to have been the opinion of Lowrie, C. J., who took occasion in Hays *v.* Kennedy, 41 Penn. St. 378, to examine the question although the case did not require him to decide it. The case was the ordinary one of two steamboats going in opposite directions on the Ohio river, and coming

Sec. 282. (§ 185.) Loss by sudden inundation.—An unprecedented freshet, flood or inundation is within the exception of an act of God and will excuse the carrier if the loss is occasioned without any contributory negligence on his part.[32] And he is not required to foresee or to provide against an unprecedented occurrence like that of a flood such as has never been known before to occur in the particular river or locality. In Nashville, etc., R. R. *v.* David,[33] it was shown that such an unprecedented flood had occurred at Chattanooga, on the Tennessee river, the water having risen some fifteen feet above what was known as the highest water-mark at the locality made by previous overflows or freshets in the river. It was also shown that the road and its depot were located on ground higher than this high water-mark. The goods reached Chattanooga before the water had become so high as to interfere with travel on the road; but before they could be forwarded from that place, it rose above the track and at last submerged the track of the road and its depot some ten or twelve feet, whereby the goods were injured. It was held that under these circumstances, if it also appeared that the agents of the road had used such diligence as prudent, skilful men engaged in that kind of business might fairly be expected to use under the like circumstances to protect and secure the property confided to their care,

into collision, as it appeared, entirely by the fault of one of them. The decision turned upon a special exception in the bill of lading of the dangers of navigation; but the learned judge expressed the opinion that had it been necessary to put the defense of the carrier not in fault upon the exception of the act of God, the circumstances would have made a case for its application. This, it is believed, however, would be giving greater extension to the term than is authorized by any of the decided cases. As to land carriage, no case, it is imagined, could ever occur in which the collision could with any sort of propriety be referred to the act of God.

32. Norris *v.* Railway Co., 23 Fla. 182; Wallace *v.* Clayton, 42 Ga. 443; Morrison *v.* Davis, 20 Pa. St. 171; Denny *v.* Railroad, 13 Gray 481; Wald *v.* Railroad Co., 162 Ill. 545, 44 N. E. Rep. 888, 53 Am. St. Rep. 332, 35 L. R. A. 356, *reversing* 60 Ill. App. 460; Long *v.* Railroad Co., 147 Pa. St. 343, 23 Atl. Rep. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741.

33. 6 Heisk. 261.

the carrier ought to be excused.[34] So in the case of Smith *v.* The Railway Company,[35] it appeared that a car containing goods was stopped at a certain point on account of a washout on the road some distance ahead and that during the night the water in a nearby river rose until it submerged the floor of the car to a depth of eighteen inches, causing injury to the goods. The overflow was the greatest that had ever been known to occur in that locality. There was no evidence that the carrier had been negligent. It was held that the injury was due to an act of God and that the carrier was therefore not liable. And in Read *v.* Spaulding,[36] where it appeared also that the damage to the goods had been caused by an extraordinary rise in the Hudson river, it was conceded without argument, and stated as unquestionable law, that such an occurrence would excuse the carrier as the act of God, if it could be shown that no fault or negligence could be imputed to him which had contributed to the loss.

Sec. 283. (§ 185a.) Loss by earthquake.—So a loss by a sudden, unusual and unexpected earthquake which breaks the walls of a mill-dam, ordinarily sufficient, and precipitates a flood of water upon a railroad company's tracks and washes them away, is a loss by the act of God for which the carrier is not responsible.[37]

Sec. 284. Loss by landslide.—Where a loss occurred by reason of a large quantity of earth having fallen upon a railroad track from a hill or embankment left by the company in excavating for its track, the slide being caused probably by the action of a rain storm not of unusual violence, the lower court, regarding it as having occurred without the intervention of im-

34. And see other cases growing out of the same occurrence, in which the decision was to the same effect. Nashville, etc., R. R. *v.* King, 6 Heisk. 269; Nashville, etc., R. R. *v.* Jackson, *id.* 271; Railroad Co. *v.* Reeves, 10 Wall. 176.

35. 91 Ala. 455, 8 So. Rep. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619.

36. 30 N. Y. 630.

37. Slater *v.* Railway Co., 29 S. Car. 96.

mediate human agency but by the forces of nature, occult, unforeseen and unexplained except by conjecture, held it to be an act of God which excused the carrier,[38] but the supreme court of the United States reversed this ruling, holding it to be such a result as might have been foreseen and guarded against.[39]

Sec. 285. (§ 185c.) Loss by snowstorm.—An unusually heavy or severe storm of snow, of such violence as to obstruct the moving of the carrier's trains or other vehicles, falls within the exception of the act of God and the carrier, if guilty of no contributory negligence, will be exonerated from liability for a loss or injury thereby occasioned.[40]

Sec. 286. Loss by wind.—An unprecedented and severe gale of wind, which is sufficiently strong to blow a railway car from the track, is an act of God.[41] So a hurricane at sea which causes the vessel to roll to such an extent that a horse is thrown down and injured has been held to come within the exception of an act of God and therefore excuse the carrier.[42]

Sec. 287. (§ 185e.) Burden of proof.—The law making the carrier a practical insurer of the safety of the goods intrusted to him for carriage, except in those cases in which he is exempt under the circumstances now being considered, it is settled that whenever the carrier claims that the loss occurred from such causes as entitle him to exemption, the burden of proving this fact rests upon him.[43] Where, however, by the plaintiff's own

38. Gleeson *v.* Railroad Co., 5 Mackey, 356.

39. Gleeson *v.* Railroad Co., 140 U. S. 435.

40. Black *v.* Railroad Co., 30 Neb. 197, 46 N. W. Rep. 428; Feinberg *v.* Railroad Co., 52 N. J. L. 451; Ballentine *v.* Railroad Co., 40 Mo. 491; Pruitt *v.* Railroad Co., 62 Mo. 527. See, also, Chapin *v.* Railroad Co., 79 Iowa, 582, 44 N. W. Rep. 820; Cunningham *v.* Railroad Co., 79 Mo. App. 524; Herring *v.* Railroad Co., 101 Va. 778, 45 S. E. Rep. 322. Where a train load of cattle was caught in a severe blizzard and the cattle were frozen to death, it was held that the loss was attributable to an act of God. Jones *v.* Railroad Co., 91 Minn. 229, 97 N. W. Rep. 893, 103 Am. St. Rep. 507.

41. Blythe *v.* Railway Co., 15 Colo. 333. See, also, Amies *v.* Stevens, 1 Strange, 128.

42. New England, etc., Steamship Co. *v.* Paige, 108 Ga. 296, 33 S. E. Rep. 969.

43. Davis *v.* Railway Co., 89 Mo.

showing it appears that the carrier is exempt, the carrier may avail himself of this evidence in his own defense.[44]

Sec. 288. (§ 186.) But carrier not excused if he negligently venture forth from place of safety.—It is to be understood, however, that an act of God will not under all circumstances excuse the carrier or enable him to escape liability for the loss. He is under all circumstances bound to use due care and diligence; and if the act of God which he alleges as his defense would not have occurred but for some careless or incautious conduct on his part, he will not be relieved.[45] He is bound to exercise a reasonable amount of forethought and prudence in the execution of his trust, and if, being the master of a ship, for instance, he ventures to sea from a harbor of safety when the storm threatens and when all nautical experience should have warned him of the danger, and the ship be lost in the tempest which follows, though it be by the act of God, he or the owners of the ship must bear the loss. And it may be stated generally that whenever he goes to meet danger in spite of the warning of the elements, or with a blind confidence that he will be able to encounter it with safety, whether it be upon the sea or upon the land, he brings the loss upon himself, and it will not avail him that the immediate cause of it was the act of God.

Sec. 289. (§ 187.) Same subject.—In the Charleston, etc., S. B. Co. *v.* Bason,[46] where goods were laden upon a steamboat which grounded from the reflux of the tide, in consequence of which she fell over and the water rose into her cabin and injured goods belonging to the plaintiff, the owners of the vessel were held liable for the loss, because it was held that the master of

340; Wallingford *v.* Railroad Co., 26 S. C. 258; Read *v.* Railroad Co., 60 Mo. 206; Wolf *v.* Express Co., 43 Mo. 423; J. H. Cownie Glove Co. *v.* Transportation Co., — Iowa, —, 106 N. W. Rep. 749. See, also, *post*, § 1353.

44. Slater *v.* Railway Co., 29 S. C. 96; Davis *v.* Railway Co., 89 Mo. 340.

45. Wolf *v.* Express Co., 43 Mo. 423.

46. 1 Harper, 262.

the vessel was guilty of negligence in not selecting a proper place for the grounding of the vessel, or in not removing the goods when he saw that the coming of the water into the cabin was inevitable under the circumstances in which the vessel was placed. He was therefore liable for two reasons: first, because of his negligence in bringing the vessel into an improper place when the danger should have been seen; and secondly, because when the grounding had occurred he did not use the proper diligence to save the goods.

Sec. 290. Same subject.—And in the case of Adams Express Co. *v.* Jackson,[47] the carrier accepted a number of horses for transportation with knowledge that the road of a subsidiary carrier over whose lines the shipment was to pass was obstructed by floods. On account of such obstruction the horses were injured. In an action against the receiving carrier it was held that, while he might have refused to receive the horses on the ground that an act of God had obstructed the line, yet having done so with knowledge of the facts, the full extent of his liability attached and the act of God was therefore no defense.

Sec. 291. (§ 188.) Same subject.—So in Campbell *v.* Morse[48] the carrier undertook to cross a stream between sundown and dark, immediately after a rain, and the wheels of his wagon stuck fast, and he was unable to extricate it before the stream rose so as to submerge the body of his wagon and damage the goods. He relied for his defense upon the nature and circumstances of the misfortune as an excuse; and although it was proven that the rise was more sudden and higher than any that had been known to take place in the stream for forty years, the court held that it was manifest that, had he gone through the ford without being stopped, the accident would not have occurred. In attempting to cross the stream under the circumstances he took upon himself the risk of its sudden rise and the consequences.

47. 92 Tenn. (8 Pickle), 326, 21 S. W. Rep. 666.

48. 1 Harper, 468.

Sec. 292. Same subject—Or if he negligently exposes the goods to danger.—But although the carrier will be excused if an act of God occasioned the loss, if it appear that his own misconduct concurred with the act of God in bringing the loss about, he cannot escape liability. He is bound to exercise due care and diligence in view of the attending circumstances to protect the goods intrusted to him for carriage. And this obligation will require that he take such precautions, when the means of doing so are at hand, as are reasonably necessary to avert a threatened danger; and if a loss ensue through his failure to take such precautions, he will not be permitted to shield himself from liability on the ground that the loss was occasioned by an act of God. He must also take notice of any signs of approaching danger, and, if they are such as reasonably to awaken apprehension, and he has the facilities for escape under his control, he must employ such facilities in removing the goods to a place of safety. And in general it may be stated that where the carrier by the exercise of reasonable diligence could have foreseen the happening of an event such as might reasonably be presumed would cause injury to the goods, and he fails to make use of the means at his command to guard against it, and the goods are thereby lost or injured, he will be liable although such loss or injury would not have happened but for an act of God.[1] Thus where cars loaded with goods were permitted to remain standing at a place where they were likely to be submerged by a flood, and the cars were later submerged and the goods injured, it was held that the carrier was liable for his failure to remove the cars to a place of safety.[2] So where a carload of wheat was allowed to remain on a side track at a time when the water in a nearby river was steadily rising,

1. Nelson *v.* Railway Co., 28 Mont. 297, 72 Pac. Rep. 642; Railroad Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. Rep. 202, citing Hutchinson on Carr; Grier *v.* Railway Co., 108 Mo. App. 565, 84 S. W. Rep. 158; Railroad Co. *v.* Bergman, 3 Tex. Ct. Rep. 168, 64 S. W. Rep. 999; Jones *v.* Railroad Co., 91 Minn. 229, 97 N. W. Rep. 893, 103 Am. St. Rep. 507; Railway Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. Rep. 555; Pinkerton *v.* Railway Co., — Mo. App. —, 93 S. W. Rep. 849.

2. Grier *v.* Railway Co., *supra.*

which fact was known to the carrier's servants, and the car was later partially submerged and the wheat damaged, it was held that the question whether the carrier had exercised ordinary care in preventing the loss by removing the car to a place of safety was properly one for the jury.[3]

Sec. 293. (§ 189.) So if his vessel be unseaworthy.—So if the carrier by water start upon his voyage in a vessel which is not seaworthy and a loss occur by reason of any of those accidents or occurrences which are understood as the acts of God, he must answer for the loss if it appear that it would not have happened had his vessel been staunch and seaworthy. In Bell *v.* Reed,[4] it was held that the loss must be borne in such a case by the carrier.

Sec. 294. (§ 190.) Or if he deviate from the usual course.—So if the carrier deviate without necessity from the regular and usual course, he will be held responsible for any loss which may occur, whether by the act of God or from any other cause. And it will not be competent for him to show that had he gone the usual and customary route, he would in all probability have encountered the same danger with the same consequences. Nor will it avail him that had he done so, the same misfortune would beyond a reasonable doubt have overtaken him. Having been guilty of an inexcusable fault in the commencement of his undertaking he takes the risk of all the consequences to its end, and the law will not permit him to say, when the loss happens, that the chances were that it would have happened in the same way and from the same cause had he done his duty.[5] And if there be two routes, one of which is more dangerous than the other, which is known to the carrier, if he

3. Baltimore, etc., Railroad Co. *v.* Keedy, 75 Md. 320, 23 Atl. Rep. 643.

4. 4 Binney, 127.

5. Crosby *v.* Fitch, 12 Conn. 410; Powers *v.* Davenport, 7 Blackf. 497; Louisville & C. Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. Rep. 970; Seavey *v.* Transit Co., 106 Wis. 394, 82 N. W. Rep. 285; Chicago, etc., Ry. Co. *v.* Dunlap, — Kan. —, 80 Pac. Rep. 34; The Dunbeth, L. R. (1897) P. 133, 66 L. J. P. Div. 66.

take the unsafe or dangerous route instead of the safer one, he takes the risk of loss by so doing.[6]

Sec. 295. (§ 191.) Same subject.—The leading case upon the subject of deviation is that of Davis *v* Garrett,[7] in which the plaintiff shipped by the defendant's vessel a quantity of lime, which, as it was alleged, was lost by a deviation by the master of the vessel from the usual and customary course between the point of shipment and the place of destination; to which the defense interposed was that the deviation by the master was not a cause of the loss sufficiently proximate to entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the vessel had proceeded in her direct course; but it was answered that no wrong-doer could be allowed to apportion or qualify his own wrong; and that as a loss had actually happened whilst his wrongful act was in operation and force, and which was attributable to his wrongful act, he could not set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done.[8]

6. Express Co. *v.* Kountz, 8 Wall. 342.

7. 6 Bing. 716.

8. Tindal, C. J.: "There are two points for the determination of the court upon this rule: the first, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; and secondly, whether the declaration is sufficient to support the judgment of the court for the plaintiff.

"As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost. Now the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious that the legal consequences must be the same whether the loss was immediately, by the sinking of the barge at once by a heavy sea when she was out of her direct

Sec. 296. (§ 192.) Same subject.—And in Williams *v.* Grant,[9] J., in discussing this subject, said: "It is a condition precedent to the exoneration of carriers that they should have been in no default; or in other words, that the goods of the bailor should not have been exposed to the peril or accident which occasioned the loss, by their misconduct, neglect or ignorance. For though the immediate or proximate cause of loss,

and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

"But the objection taken is that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself; for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course.

"But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet in Parker *v.* James, 4 Camp. 112, where the ship was captured whilst in the act of deviation, no such ground of defense was even suggested. Or again, if the ship strikes against a rock or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock or met with the same or another storm if pursuing her right and ordinary voyage.

"The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable.

"But we think the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst this wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done; but there is no evidence to that extent in the present case."

9. 1 Conn. 487.

in any given instance, may have been what is termed the act of God or inevitable accident, yet if the carrier unnecessarily exposes the property to such accident by any culpable act or omission of his own, he is not excused.'' And accordingly in the case of The Delaware,[10] where the master of the vessel had stowed the goods on deck when it was his duty to stow them under deck, and the goods had to be jettisoned in a storm in consequence of such stowage, it was held that the vessel should bear the whole loss, and could not demand contribution of its freighters although the jettison was made necessary by a storm.

Sec. 297. (§ 193.) Where the loss would not have occurred but for the carrier's unreasonable delay.—But suppose the carrier delays an unreasonable time on his journey, and it is shown that but for such unreasonable delay he would have been able to deposit the goods in safety, or to deliver them to the next succeeding carrier by whom they would have been carried beyond the reach of the danger which has occasioned their loss, shall the carrier be held liable under such circumstances for the loss of the goods as the consequence of his delay? Different views of this question have been taken by the American courts. It is maintained in those cases which hold that the carrier is not liable that, while the loss might not have happened but for the delay, the carrier is responsible only where his negligence was the proximate cause of the loss; that where an act of God has intervened, it cannot be said that the carrier could have foreseen and anticipated that the goods would be overtaken by such a casualty as a natural and probable consequence of the delay, and that the delay is therefore but the remote cause of the loss and the carrier must accordingly be excused from liability.

Sec. 298. Same subject.—Thus in Morrison *v.* Davis,[11] goods which were being carried on a canal-boat were injured by the wrecking of the boat by an extraordinary flood, and it was held that this being an act of God which would excuse him if he were

10. 14 Wall. 579.

11. 20 Penn. St. 171.

not in fault, the rule was not changed by reason of the fact that one of the horses attached to the boat was lame, and that such delay was thereby caused that the boat did not sooner pass the place where the accident occurred, beyond which it would have been safe. In other words, the fact was that but for this delay the goods would have been put beyond danger and would not have been lost. It was held that carriers being answerable for the ordinary and proximate consequences of their negligence and not for those which are remote and extraordinary, and the flood and not the delay in this case being the proximate cause, the case came within the exception of the acts of God.[12]

Sec. 299. (§ 194.) Same subject.—In Denny *v.* The N. Y. Central Railroad,[13] the goods were carried to the end of its route by the railway company, and while they were in its warehouse there awaiting delivery to another carrier, they were injured by a flood in the Hudson river. It was found that the company had been negligent in delaying the transportation of the goods, and that the goods would not have been exposed to the cause of the damage had they arrived by the defendant's road as soon as they should have done, because in that event they would have been carried forward by the connecting carrier in time to avoid the flood. It was contended that, as the damage was the direct consequence of the delay in the transportation, the company should be held liable for the loss; but it was held that the flood, which was the act of God, being the proximate, and the delay of the company only the remote, cause of the loss, it should be excused.[14]

12. For cases following this doctrine see, Railroad Co. *v.* Millsaps, 76 Miss. 885, 25 So. Rep. 672, 71 Am. St. Rep. 543, 17 Am. & Eng. Rd. Cas. (N. S.) 269; Herring *v.* Railroad Co., 101 Va. 778, 45 S. E. Rep. 322; Moffatt, etc., Co. *v.* Railroad Co., — Mo. App. —, 88 S. W. Rep. 117; Railway Co. *v.* Darby, 28 Tex. Civ. App. 229, 67 S. W. Rep. 129; Railroad Co. *v.* Bergman, 3 Tex. Ct. Rep. 168, 64 S. W. Rep. 999; Hunt Bros. *v.* Railway Co. (Tex. Civ. App.), 74 S. W. Rep. 69; Read *v.* Railroad Co., 60 Mo. 199; Pruitt *v.* Railroad Co., 62 Mo. 527; Elam *v.* Railroad Co., — Mo. App. —, 93 S. W. Rep. 851.

13. 13 Gray, 481.

14. This case was subsequently approved and followed by the

Sec. 300. (§ 195.) Same subject.—These cases were cited and approved by the supreme court of the United States in the case of The Railroad *v.* Reeves,[15] where the carrier also relied upon the fact that the goods were injured by an extraordinary overflow. This was in turn met by a charge of negligence on the part of the carrier in not forwarding the goods beyond the point of danger as soon as it had agreed to do or as soon as its duty required it to do under the circumstances of threatened danger. But the principle upon which the foregoing cases were decided was approved by the court, and as it was at variance with the general groundwork of the charge of the court below, under which the jury had found a verdict for the plaintiff, the case was reversed and remanded. It was further held that even if the railroad company had contracted with the plaintiff to start with his goods the evening before the occurrence, which would have taken them byond its influence, and which the plaintiff undertook to prove it had agreed to do, it would still not be liable for the loss, because the failure to comply with such a contract would have been only the remote and not the proximate cause of the loss. And these cases were

same court in Hoadley *v.* The Northern T. Co., 115 Mass. 304, in which the carrier was protected from liability for loss by fire by its contract, which protection, however, it was contended, it had forfeited by its delay in removing the goods. But this contention was not sustained by the court, which went on to say that "in cases of this description the injury complained of must be shown to be the direct consequence of the defendant's negligence. This, it was said, is the only practical rule which can be adopted by the courts in the administration of justice. It is not enough that the act charged may constitute one of a series of antecedent events without which, as the result proves, the damage would not have happened. The legal damages which follow any wrong are only such as, according to common experience and the usual course of events, might reasonably be anticipated. The defendant's liability extends only to natural and probable consequences. . . . It is the same whether it arises from the common law, is secured by special contract, or results from the changed responsibility which takes place when the carrier becomes a warehouseman."

15. 10 Wall. 176. See, also, Gleeson *v.* R. R. Co., 5 Mack. 356; 140 U. S. 435; Northern Pacific Ry. Co. *v.* Kempton (C. C. A.), 138 Fed. 792. To the same effect,

also approved and followed in Daniel *v.* Ballantine,[16] where the facts were that the defendants having undertaken to tow a barge from one point on Lake Erie to another, after having commenced the towage, stopped unnecessarily, as was alleged, for three days during which the weather was fair, and at the end of that time resumed their trip with the barge and were overtaken by a storm, in which it was lost. It was held that though if they had not stopped on the way the barge would have been taken through safely, yet, upon the principle of the foregoing cases, the defendants could not be held liable. Their reasoning was also expressly approved by the supreme court of Michigan in the case of The Railroad *v.* Burrows,[17] in which there was a delay beyond the ordinary time in the transportation of a car-load of apples, caused by the injury done to the track of the road by the Chicago fire, the great accumulation of freight occasioned thereby and the imperative necessity for the transportation of relief goods in preference to other freight by the road, in consequence of which delay the apples were frozen. It was held that the delay under these circumstances was excusable, but that even if it had not been it could not have been considered as the natural and proximate cause of the loss, and that therefore the carrier would not have been liable if no such reasons for the delay had existed.

Sec. 301. (§ 196.) Same subject—The contrary view.—Other courts, however, decline to follow the rule that the carrier, although he has negligently delayed in sending the goods forward, is excused from liability for loss or injury if an act of God has intervened, and contend that the rule which thus excuses the carrier is based upon a too strict application of the doctrine of proximate cause.[18] Nothing is better settled than that

Empire State Cattle Co. *v.* Railway Co., 135 Fed. 135, *citing* The R. D. Bibber, 50 Fed. 841, 2 C. C. A. 50; Thomas *v.* Lancaster Mills, 71 Fed. 481, 19 C. C. A. 88; Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65; Railway Co. *v.* Insurance Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; Sheffer *v.* Railroad Co., 105 U. S. 249, 26 L. Ed. 1070.

16. 23 Ohio St. 532.

17. 33 Mich. 6.

18. See Bibb Broom Corn Co.

in case of an unnecessary deviation the carrier will be liable, no matter what the immediate cause of the loss may have been, because the law will trace the loss back to the first fault and will there fix the liability for it, even though the immediate cause may have been some violent and unavoidable change or convulsion in nature. In other words, whenever the carrier attempts to evade responsibility for the loss by charging it to such a cause, he can be successfully met by showing the deviation.[19] And it is difficult to understand why, if he is liable for a loss or injury in case of an unnecessary deviation, he should be excused where he has neglected to send the goods forward with reasonable dispatch. In either case there is a failure to comply with an obligation imposed by the contract of carriage and it would seem that the same degree of responsibility should attach.

Sec. 302. Same subject.—Thus in Michaels *v.* The Railroad,[20] the facts were that the railroad company had received the goods of the plaintiff for immediate carriage, but instead of forwarding them at once as was its duty, it retained them for several days, when a flood came and injured them. The damage would not have occurred had the company sent them forward without delay, and their only excuse for not having done so was that, being a connecting road, it was not customary to send goods forward until it had been furnished with a bill of back charges by the other connecting road. It was not contended but that the flood was a *vis major*, and that as an act of God it would have been an excuse for the injury suffered by the goods but for the negligence of the company in not sending them forward as soon as it ought to have done; but it was held without any reference to the cases of Morrison *v.* Davis and Denny *v.* The Railroad, that the company had not assigned a sufficient reason for the detention of the goods, and that they

v. The Railway Co., — Minn. —, 102 N. W. Rep. 709, 69 L. R. A. 509.

19. Crosby *v.* Fitch, 12 Conn. 410; Davis *v.* Garrett, 6 Bing. 716; Seavey *v.* Transit Co., 106 Wis. 394, 82 N. W. Rep. 285; Chicago, etc., Ry. Co. *v.* Dunlap, — Kan. —, 80 Pac. Rep. 34; Parmalee *v.* Wilks, 22 Barb. 539; *ante*, § 115.

20. 30 N. Y. 564.

were liable for the loss by reason of the delay, though the flood might have been the proximate and immediate cause of the loss.

Sec. 303. (§ 197.) Same subject.—And so in Read *v.* Spaulding,[21] the goods of the plaintiff were unreasonably delayed, and while awaiting transportation were damaged by the same flood. It was conceded that the injury had been caused by the act of God, and that there had been inexcusable delay, and the only question to be determined was whether the defendant had not precluded himself, by his negligence in not sooner sending forward the goods, from the benefit of that defense; and it was held that he had done so, upon the broad ground that the carrier in order to avail himself of such a defense must be without fault; and it was said of the cases of Morrison *v.* Davis and Denny *v.* The Railroad, that, so far as they held a contrary doctrine, they were certainly in conflict with numerous adjudged cases and would greatly relax the rules as to the responsibilities of carriers, and ought not to be followed. The judgment of the court below, which had taken the same view of the question, was therefore affirmed.

Sec. 304. Same subject.—The latter cases were followed in Bostwick *v.* The Railroad,[22] Condict *v.* The Railway,[23] and Dunson *v.* The Railroad,[24] in the same state; and decisions to the same effect have been made in Wolf *v.* The American Express Company,[25] Green, Wheeler Shoe Company *v.* The Railway,[26] Alabama, etc., Railroad Company *v.* Quarles & Couturie,[27] Wabash Railroad Co. *v.* Sharpe,[28] and in The Michigan Central Railroad *v.* Curtis,[29] where it appeared that the goods had been destroyed by freezing which would not have occurred but for the delay in the transportation; and although the injury occurred while the goods were in the custody of another carrier to which the defendant had delivered them to complete the transportation,

21. 30 N. Y. 630.
22. 45 N. Y. 712.
23. 54 N. Y. 500.
24. 3 Lans. 256.
25. 43 Mo. 421.
26. — Iowa, —, 106 N. W. Rep. 498.
27. — Ala. —, 40 So. Rep. 120.
28. Wabash R. Co. *v.* Sharpe, — Neb. —, 107 N. W. Rep. 758.
29. 80 Ill. 324.

the defendant, as the party in fault by reason of the delay, was held liable. So in Wald *v.* The Railroad,[30] the carrier was held liable where he negligently failed to forward a passenger's baggage on the same train with the passenger, and it was destroyed in the Johnstown flood. And in the Southern Express Company *v.* Womack,[31] goods were delivered during the late civil war to the agent of the company at one of its offices upon the line of the railroad for transportation; but owing to the great accumulation of freight, the company was unable to take the goods upon its car, and they were permitted to remain at the depot in charge of the agent for some twenty days, at the end of which time they were captured by Federal troops and lost. Suit was brought against the company, and it was held without reference to any of the foregoing cases or to any case previously decided upon the subject, but upon general principles of law, the court evidently regarding the delay as the *causa proxima* of the loss, that although the captors of the goods were to be regarded as the public enemy, the company was liable in consequence of its delay in the transportation of the goods.[32]

Sec. 305. Same subject.—And in the case of Bibb Broom Corn Co. *v.* The Railway,[33] it appeared that the railway company accepted for transportation a carload of broom corn, and that during an unreasonable delay the car was submerged by a flood which so greatly damaged the broom corn that the plaintiff, on its arrival at destination, refused to accept it and brought suit against the company for the loss. It was admitted that the flood was an act of God and the question was whether the carrier should, on account of the delay, be held responsible for the injury. The court, after a review of the cases which hold that the carrier under such circumstances should be excused, said: "The rule that permits a carrier to excuse his negligence by an

30. 162 Ill. 545, 44 N. E. Rep. 888, 53 Am. St. Rep. 332, 35 L. R. A. 356, *reversing* 60 Ill. App. 460. See, also, Edson *v.* The Railroad, 70 Ill. App. 654.

31. 1 Heisk. 256.

32. See, also, Railway Co. *v.* McFadden (Tex. Civ. App.), 32 S. W. Rep. 18, citing Hutchinson on Carr.

33. — Minn. —, 102 N. W. 709, 69 L. R. A. 509.

act of God overtaking him while thus in fault seems to be unsound. It is based on too strict an application of the rule of proximate cause. It is the duty of a common carrier to whom goods are delivered for transportation promptly and without unreasonable delay to forward them to their destination. . . . If the defendant had acted as enjoined by law, the car would have arrived at its destination prior to the flood. That the defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not, in such cases, a defense. Every reason in equity and justice relieves the carrier from the performance of his contract and from liability for injuries to property in his custody for transportation resulting exclusively from an act of God or other inevitable accident or cause over which he has no control and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract and by his unreasonable delay and procrastination is overtaken by an overpowering cause even though of a nature not reasonably to be anticipated or foreseen."

Sec. 306. Same subject—How where loss, due to cause excepted by contract, would not have occurred but for the carrier's unreasonable delay.—Where the carrier has exempted himself by contract from liability for losses arising from certain causes, and a loss ensues from one of such excepted causes, which loss, but for the carrier's unreasonable delay, would not have happened, it is held that, if the cause of the loss was not attributable to any negligence on the part of the carrier, the delay will be considered as only the remote cause and the carrier will not be liable.[34] Thus grain was shipped under a bill of lading the terms of which exempted the carrier from liability for loss

34. Davis *v.* Railroad Co., 66 Vt. 290, 29 Atl. Rep. 313, 44 Am. St. Rep. 852; Reid *v.* Railroad Co., 10 Ind. App. 385, 35 N. E. Rep. 703, 53 Am. St. Rep. 391; General Fire Extinguisher Co. *v.* Railway Co., 137 N. Car. 278, 49 S. E. Rep. 208.

or damage caused by fire unless the same was due to negligence. The grain was placed in the carrier's warehouse to await orders from the shipper to forward it, this being done in accordance with a course of dealing previously followed. A fire broke out in the warehouse without any fault or negligence on the carrier's part, and the grain was destroyed. It appeared that the grain had all been ordered forward by the shipper at periods varying from thirty to seven days before the loss, and it was therefore contended that the delay or negligence of the carrier in not removing it as speedily as he should have done subjected him to liability for the loss. In holding that the carrier had incurred no liability, the court said: "It is evident that the fire was the immediate proximate cause of the destruction and loss of the grain. If the fire had not occurred, the grain would not have been lost. The *causa causans* was the fire. The concomitant incident was the delay by the defendant in removing it from the warehouse. But that delay would not have destroyed the grain and caused its loss if the fire had not intervened. It is generally held that a common carrier is liable on the ground of negligence only when that negligence is the proximate cause of the loss, and if the loss arises in such a manner that it will not support an action, neither will the remote cause, though incidental to the proximate cause."[35]

Sec. 307. (§ 199.) Effect of unreasonable delay upon insurance.—Unreasonable delay by the carrier has been held to be the same in its effect upon the insurance upon the cargo as a deviation. In Mount *v.* Larkins[36] it was so held by Tindal, C. J., "not only from the reason of the thing itself," but upon numerous authorities cited by him; and the reason is said to be, not

35. Davis *v.* Railroad Co., *supra.* But where the loss arises from a cause excepted by the contract, the loss being made possible by the carrier's unreasonable delay, the same difference of opinion would no doubt be encountered as exists where the carriers unreasonable delay has subjected the goods to injury by an act of God. See Tewes *v.* Steamship Co., 85 N. Y. Supp. 994, 89 App. Div. 148; Keeney *v.* Railroad Co., 47 N. Y. 525.

36. 8 Bing. 108.

that the risk is thereby increased, but because the insurer has, without necessity, substituted another voyage for that which was insured, and thereby varied the risk which the underwriter took upon himself. If equivalent to a deviation as to the insurer, it is not perceived why it should not be so as to the carrier himself; and if it be so, he should undoubtedly be held liable for any loss which can be traced to it, although the immediate cause of such loss may be an inevitable occurrence which comes within the meaning of the act of God.

Sec. 308. (§ 200.) Carrier responsible as in case of deviation.—It thus appears that there are many cases in which, as is well settled, we may look further than to the mere immediate occurrence which has caused the loss, and trace it back to the fault from which it in fact originated and without which it must be presumed that it would not have happened; and there would seem to be no good reason why, if the loss can be traced with any certainty to the fault of unreasonable delay, the carrier should not be held responsible for it in the same manner as he would be for the fault of an unnecessary deviation.

Sec. 309. (§ 201.) The degree of diligence to be exercised by the carrier when the goods have been overtaken by disaster.—When disaster has overtaken the carrier from some inevitable cause which would bring the case within the legal exception to his liability, if the goods have not perished thereby, duties still remain to be performed by him before he can entitle himself to the claim of exemption from such liability. As he is required to exercise a due degree of diligence and caution to avoid the danger, so, when it has overtaken him without his fault, his obligation of preservation and safe custody still continues, if the goods have not been destroyed. If, for instance, his vessel has been sunk or cast ashore, or in any way disabled by one of those occurrences known as the acts of God, if the goods have not been lost but remain, though in a condition of peril, he cannot abandon them to their fate, and escape the responsibility by the plea that they were lost or destroyed by the storm or other inevitable casualty. It therefore becomes a ques-

tion of importance to determine what degree of diligence, skill and capacity he is required to apply in such cases, in order to save the goods from loss or further damage. This question has been repeatedly passed upon by the courts, and it may be considered as the settled law that all that can be required of him in such an emergency is the exercise of a reasonable amount of skill and diligence, and that he shall do all that is reasonably and practically possible to insure the safety of the goods. The very question was brought before the court in the case of Nashville, etc. R. R. *v.* David.[37] In the lower court the jury had been instructed that the law required of the carrier, in such a predicament, to use all the diligence which human sagacity could suggest in protecting the property. But the supreme court ruled that this was erroneous, and held the law to be that, in case of such accident or emergency, the carrier is bound to use such means as would suggest themselves to and be within the knowledge of well-informed and competent business men in such positions, and such diligence as prudent, skillful men engaged in that kind of business might fairly be expected to use under like circumstances, which should be actively used to protect and secure the property confided to their care. "It would be impossible," say the court, "for all the roads of the country to command employees possessing the highest human sagacity, nor does the law make any such stringent and unreasonable demand upon them in order to shield them from liability in a case like the present." The duty of the carrier in such cases was stated in very nearly the same language in Morrison *v.* Davis,[38] which was approved by the supreme court of the United States in The Railroad *v.* Reeves,[39] as expressing the true rule upon the subject.

37. 6 Heisk. 261.

38. 20 Penn. St. 171. See *post*, § 631.

39. 10 Wall. 176. See, also, Grier *v.* The Railway, 108 Mo. App. 565, 84 S. W. Rep. 158.

In Black *v.* Railroad Co., 30 Neb. 197, 46 N. W. Rep. 428, a train loaded with hogs became obstructed by an unprecedented snowstorm and many of the hogs perished. The question was as to the degree of care which the carrier was bound to exercise to get the hogs out of the cars and into a place of safety. Said the court:

"The rule seems to be that a

Sec. 310. Same subject.—So where the carrier permitted a quantity of wheat to remain in a car for several days after water in a nearby river had risen and partially submerged the car, and a portion of the wheat which had not previously been wet was thereby damaged, it was said not to be error to submit the question to the jury to determine from their practical knowledge whether by the exercise of ordinary diligence and care some of the wheat might not have been removed and saved from total destruction, and whether a man of ordinary prudence

carrier of live stock is an insurer of the safety of the property while it is in his custody, subject to certain well-defined exceptions. He is not liable for injuries resulting unavoidably from the nature and propensities of the property, nor for damages resulting from the act of God or the public enemy. The evidence brings this case within the exception to the general rule. An unprecedented snowstorm, of such violence as to obstruct the moving of trains, falls within the term 'act of God.' Ballentine *v.* Railroad Co., 40 Mo. 491; Pruitt *v.* Railroad Co., 62 Mo. 527. While carriers are not insurers against loss occasioned by the act of God, they cannot, on the happening of such an event, abandon the property. What degree of care and diligence at such a time is required in caring for and protecting the property from injury and loss? The plaintiffs insist that the carrier is required to bestow the highest degree of care, and, if he fails to exercise all possible diligence, and injury occurs by reason thereof, he is liable. In Gillespie *v.* Railway Co., 6 Mo. App. 554, the court, in considering the degree of diligence required of a common carrier as against an act of God, say: 'By these instructions the difference between the responsibility of the carrier as against the act of God and as against these perils which the carrier is answerable for is ignored. The carrier is held by the instructions to the highest degree of foresight and care as against an act of God; but the law imposes on him no such liability. It has been truly said there is hardly an act of God, in a legal sense, which an exhaustive circumspection might not anticipate, and supposable diligence not avert the consequence of; so that the doctrine would end in making the carrier responsible for acts of God, when, by law, the passenger and not the carrier assumed the risk. It has been said that to make the rule a working rule, and give to the carrier the practical benefit of the exemption which the law allows him, he must be held, in preventing or averting the effect of the act of God, only to such foresight and care as an ordinarily prudent person or company, in the same business would use under all the circumstances of the case.' We have carefully examined the nu-

might not with reasonable effort have saved a large part of the wheat.[1]

Sec. 311. (§ 202.) Same subject.—And in Nugent *v.* Smith,[2] which was the case of a ship at sea caught in a storm, and the

merous authorities bearing upon the question, and the rule established by the adjudicated cases is that the carrier is required to exercise ordinary or reasonable care and diligence to secure the property committed to his custody from loss or damage, in order to protect himself from injury arising from the act of God. If his negligence contributes to the injury he cannot claim exemption from liability. Morrison *v.* Davis, 20 Pa. St. 171; Railroad Co. *v.* Reeves, 10 Wall. 176; Railroad Co. *v.* David, 6 Heisk. 261; Denny *v.* Railroad Co., 13 Gray, 481; Swetland *v.* Railroad Co., 102 Mass. 276; Railroad Co. *v.* Anderson, 6 Am. & Eng. R. Cas. 407; Gleeson *v.* Railroad Co., 28 *id.* 202 (140 U. S. 435); Ballentine *v.* Railroad Co., 40 Mo. 491; Pruitt *v.* Railroad Co., 62 Mo. 521.

"In the instructions given the rule is stated that, if the defendant did not use ordinary care in protecting, caring for and transporting the hogs, it was liable. We were at first inclined to believe that the instructions were faulty on account of the using of the word 'ordinary,' but, after further consideration, we are satisfied that there is no substantial difference between ordinary care and reasonable care. It seems that the words are interchangeably used. Kendall *v.* Brown, 74 Ill. 232; Fallon *v.* City of Boston, 3 Allen, 38; Neal *v.* Gillette, 23 Conn. 436. Under the testimony there was but one controverted fact to submit to the jury, and that was whether the defendant was guilty of negligence. The instructions, taken as a whole, stated the law applicable to the case, and fairly submitted to the jury the question of negligence. The only conclusion that could have been drawn from the testimony was that the storm was extraordinary and unprecedented for that season of the year. While the charge of the court did not state in so many words that the act of God must have been the immediate or proximate cause of the loss in order to excuse the company from liability, yet that was the plain purport of the language used in the fifth paragraph. The jury could not fail to understand from that instruction that, if the defendant did not use ordinary care, the negligence of the defendant was the proximate cause of the loss, and that the plaintiffs were entitled to damages."

In Feinberg *v.* Railroad Co., 52 N. J. L. 451, the carrier was held liable under like circumstances where, during the detention, it put cows and young calves in cattle-sheds, where many were frozen, while it had warmer and sufficient horse-sheds at its disposal unoccupied.

1. Baltimore, etc., R. Co. *v.* Keedy, 75 Md. 320, 23 Atl. Rep. 643.

2. 1 Law R. Com. P. Div. 423.

question being as to the degree of care which was required of the carrier in respect to the goods in his charge to protect him from a loss arising from the act of God, it was said by Cockburn, C. J., that "if he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if under such circumstances he is overpowered by the storm or other natural agency, he is within the rule which gives immunity from such *vis major* as the act of God." And in the case of The Generous,[3] it was said that the carrier would be protected, if, being in peril, he used all practicable endeavors to surmount the difficulties which on fair trial he found insurmountable—not all the endeavors which the wit of man, as it exists in actual understanding, might suggest, but such as might reasonably be expected from a fair degree of discretion and an ordinary knowledge of business. But in The Propeller Niagara *v.* Cordes,[4] it was held by Clifford, J., in delivering the opinion of the court, that in such cases it was the duty of the master of the vessel "to take all possible care of the goods," and that "he was responsible for every loss or injury which might have been prevented by human foresight, skill and prudence;" and such was the opinion of Story, J., in King *v.* Shepherd.[5] But according to the more recent cases which have been cited, this was stating the rule rather too strongly. And in this case, as in others, the carrier's liability is to be determined in the light of the circumstances as they appeared to him at the time, and not in the clearer light that often presents itself when the emergency has passed away and events are seen in different relations.[6]

Sec. 312. (§ 202a.) Burden of proof as to carrier's contributory negligence.—Where the claim is made that, notwithstanding the intervention of an act of God, the loss would not

3. 2 Dodson, 324.
4. 21 How. 7.
5. 3 Story, 358.
6. Smith *v.* Railway Co., 91 Ala. 455, 8 So. Rep. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619; Railroad Co. *v.* Kellogg, 94 U. S. 475; Blythe *v.* Railway Co., 15 Colo. 333. See, also, Long *v.* Railroad Co., 147 Pa. St. 343, 23 Atl. Rep. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741.

have happened but for the negligence of the carrier, as in unreasonably delaying or exposing the goods, the burden of proving such negligence is, according to the weight of authority, upon him who affirms it.[7]

Sec. 313. (§ 202b.) Act of God will not excuse if carrier has wrongfully refused to deliver goods.—The act of God which would otherwise excuse will not relieve the carrier where the goods are destroyed after he has wrongfully refused to deliver them to the consignee upon presentation of the bill of lading.[8]

III. CARRIER NOT LIABLE FOR LOSSES ARISING FROM ACTS OF THE PUBLIC ENEMY.

Sec. 314. (§ 203.) Exception of losses arising from the acts of the public enemy.—The only other exception early made by the law in favor of the carrier is of losses arising from capture by the public enemy, or, as it is generally expressed, by the king's enemies; and by the word enemies in this connection is to be understood the public enemies of the country of the carrier and not of the owner of the goods. So that if the goods be intrusted to a foreign carrier whose country is at war with another and he is captured by the latter, it is a loss by the public enemy which will excuse him.[9]

Sec. 315. (§ 204.) Reason for this exception.—This exception is said to have been made in the carrier's favor because of the exceeding hardship which it would have imposed upon him to compel him to pay for losses when he could have no recourse or remedy over against those who had brought the loss upon him; and, therefore, it is said that the enemy must be the king's enemy or the public enemy, and not those merely who engage in mobs, riots, insurrections and the like; for against them he might have his remedy by proceeding against the hundred. But

7. See post, § 1354 *et seq.*

8. Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. Rep. 357.

9. Russell *v.* Neiman, 17 Com. B. (N. S.) 163.

what appears a more plausible reason is that there could be but little if any danger of his combining with the common public enemy to defraud the owner of the goods by a pretense of being robbed, while the danger of such combinations with ordinary thieves and robbers was more to be apprehended. But the reason for the exception or for its being confined to the public or common enemy can be of no interest at this day except as a matter of curious legal history. The law has been settled for centuries that losses by thieves or robbers and mobs and riots are to be borne by the carrier unless he has protected himself from such liability by his contract. "For though the force be never so great, as if a multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."[10]

Sec. 316. (§ 205.) Who are public enemies—Mobs—Rioters—Strikers—Thieves—Pirates.—Losses, therefore, which are occasioned by the depredations or the violence of mobs, rioters, "strikers," thieves and the like,[11] however much they may be in some sense the common enemies of the country, do not come within the exception; nor do losses by robbers, whether upon

10. Coggs *v.* Bernard, 2 Ld. Raym. 909.

11. "Strikers" are not the public enemy, so as to excuse the carrier for a destruction of property by them. Hall *v.* Railroad Co., 14 Phila. 414. Though their interference may excuse a delay in delivery. Geismer *v.* Railway Co., 102 N. Y. 563; Lake Shore Ry. Co. *v.* Bennett, 89 Ind. 457; Pittsburgh R. Co. *v.* Hollowell, 65 Ind. 188; Pittsburgh R. R. Co. *v.* Hazen, 84 Ill. 36; Haas *v.* Railroad Co., 81 Ga. 792; Lang *v.* Railroad Co., 154 Pa. St. 342, 26 Atl. Rep. 370, 35 Am. St. Rep. 846, 20 L. R. A. 360; Railway Co. *v.* Nevill, 60 Ark. 375, 30 S. W. Rep. 425, 46 Am. St. Rep. 208, 28 L. R. A. 80, citing Hutchinson on Carr.

the highway or upon the sea.[12] So the wilful and unlawful destruction of the property by United States soldiers, not acting in the line of their duty, is not a loss by the act of the public enemy.[13] But pirates are regarded as the common enemy of all mankind—*hostes humanis generis*—and are therefore considered as enemies of the king; and hence losses by them are regarded as coming within the exception, although piracy is in fact nothing more than robbery or a forcible depredation upon the sea, *animo furandi*.[14]

12. Morse *v.* Slue, 1 Ventris, 190.

13. Seligman *v.* Armijo, 1 N. Mex. 459.

14. Story on Bail. § 526; Pickering *v.* Barkley, Style, 132. The report of this case is as follows: Pickering brought an action of covenant upon a deed of covenants of charter-party, whereby it was covenanted that the defendant, in consideration of a certain sum of money agreed to be paid to the defendant for freight of a ship, should make such a voyage and bear all the losses and damage which should befall the ship or merchandises in her, *excepting only perils of the sea*, and declares that the defendant had not performed his agreement, and for this he brings his action. The defendant pleads that in the making of his voyage upon the sea, the ship was taken, *per quosdam ignotos homines bellicosos*, whereby he was hindered in making of the voyage according to his agreement. To this plea the plaintiff demurs. The question was, in regard that in the charter-party perils of the sea were excepted, whether the taking of the ship by these unknown men of war should be accompted a peril of the sea or not, according to the meaning of merchants. Twisden, of counsel with the plaintiff, held it should not, and so the plea was not good, and that therefore the plaintiff ought to have judgment, and said that this was not a danger of the sea, but a danger upon the sea; secondly, he said the party (it may be) might have prevented it by vigilancy or by making resistance; and so it may be it was his own fault the ship was taken; thirdly, the men of war that took the ship were peradventure Englishmen, and then the defendant is not to be excused, for he may have his remedy for what he is damnified against them; and cited 33 H. 6, fol. 1, and prayed judgment for the plaintiff. Hale (Sir Matthew Hale), of counsel with the defendant, held that to be taken and robbed by pirates is a danger of the sea, even as tempestuous winds and shelfs and rocks are; and secondly, to that it is said the pirates may be Englishmen; we are not able to say of what nation they were, and therefore our plea is good in that point also; and prayed judgment for the defendant. Roll, justice, said it was not well

Sec. 317. (§ 206.) Same subject—Rebellion—Revolution.—But rebellion may grow into revolution and assume the proportions of a war which may entitle those in revolt to the acknowledgment of belligerent rights from other nations. In such cases carriers of either belligerent would stand in the relation of public enemy to the other and would be entitled to the protection of the rule which exonerates them from losses by the public enemy. Such was the case of our Revolutionary war, and so it has been held of the various revolts of the Spanish colonies in America.[15] And where hostilities between the people of two sections of the same country became so serious and flagrant as to acquire the character of a war, and the combatants treat each other as enemies with a recognition of belligerent rights, they are public enemies within the meaning of this exception. Such was the late war between the United States government and what were called the Confederate States, which attempted to secede from it.[16] Several cases involving the liability of the carrier where the goods intrusted to him were lost by capture by the contending military forces in that contest have come before the courts. During the war it was brought directly to the consideration of the supreme court of Kentucky in the case of Bland *v.* The Adams Express Company.[17] Goods intrusted to that company for carriage had been forcibly taken from it by what were known as Confederate soldiers, in arms against the

pleaded to say *per homines ignotos*. Bacon, justice, said: The defendant doth not show that he and his ship was carried *per locos incognitos*, as he should have shown. But Roll, justice, answered that it may be the ship is yet kept upon the sea, but I suppose that pirates are perils of the sea; and to this purpose a certificate of merchants was read in court, that they were so esteemed among merchants. Yet the court desired to have Granly, the master of the Trinity House, and other sufficient merchants, to be brought into court to satisfy the court *viva voce* Friday next following. Judgment was given this term, *nil capiat per billam*, because the taking by pirates are accompted perils of the seas.

15. United States *v.* Palmer, 3 Wheat. 610; Mauran *v.* Ins. Co., 6 Wall. 1; Nesbitt *v.* Lushington, 4 Term, 783.

16. The Prize Cases, 2 Black, 635; Thorington *v.* Smith, 8 Wall. 1; Nashville, etc., R. R. Co. *v.* Estes, 10 Lea, 747.

17. 1 Duvall, 232.

government, and this fact was relied upon in its defense in the suit to recover for the loss. Robertson, C. J., considered the defense valid. "War," said he, "is either international or civil, foreign or domestic. Insurrection, however violent or formidable, is not war. Civil war is preceded by insurrection, which becomes magnified and matured into war in the legitimate sense. And when so characterized, the parties are belligerents and respectively entitled to belligerent rights."[18] In The Southern Express Company *v.* Womack,[19] the facts were the same, except that the relations of the carrier and the captors were reversed, the latter being in this instance the troops of the government; and it was held that, whatever might have been the political relations in which the parties stood to each other as an abstract proposition, the fact that those upon either side of the dividing line were engaged in flagrant war and treated each other as enemies necessarily made them public enemies in the understanding of the contracting parties, and the carrier was not therefore to be regarded as an insurer against loss that might occur by the act of the hostile forces. And it has been held that the Confederate forces were neither robbers on land nor pirates at sea.[20] A different opinion, however, has been expressed by the supreme court of Maine.[21]

Sec. 318. (§ 207.) Same subject—Declaration of war not necessary if actual hostilities exist.—It is not necessary, to constitute the relation of public enemy between the carrier and his captors, that there should be an open declaration of war between the two countries to which they belong. The existence of actual hostilities is sufficient to constitute the relation of public enemies, and all persons within the respective hostile territories are enemies of each other, whether in arms or not, and whatever may be their personal dispositions towards the contending parties.[22]

18. Frank *v.* Keith, 2 Bush, 123; Lewis *v.* Ludwick, 6 Cold. 368.

19. 1 Heisk. 256; *ante*, § 303.

20. Fifield *v.* Ins. Co., 47 Penn. St. 166; Mauran *v.* Ins. Co., 6 Wall. 1.

21. 51 Me. 465.

22. The Prize Cases, 2 Black, 635; Alexander's Cotton, 2 Wall. 404.

Sec. 319. (§ 208.) Carrier liable if loss by public enemy caused by his negligence or deviation.—The same qualification exists in reference to the exemption of the carrier from loss by the act of an enemy as has already been stated in regard to a loss by the act of God; that is, that in order to be available as a defense it must not appear that the carrier has been guilty of negligence or temerity in not avoiding or in bringing about the capture. If in the course of deviation he be captured and the goods be lost, he is responsible; for, as has been said, the law will trace back the loss to the first fault to which it is attributable. Parker *v.* James[23] was this very case of a capture in the course of a deviation, and yet, as said by Tindall, C. J., in Davis *v.* Garrett,[24] no such ground of defense was even suggested. So if he were to land upon the enemy's coast; or, being aware of his proximity, made no effort to escape or took no precautions to avoid him; or if, having the choice of two routes, he took that which was the more dangerous;[25] or if he exposed them to capture by an inexcusable or unreasonable delay.[26]

Sec. 320. Same subject—May carrier show that loss would have happened without his negligence or deviation.—But suppose there has been a deviation or delay or negligence of any other kind on the part of the carrier, and the goods are destroyed by an act of God or of the public enemy while such deviation, delay or other cause resulting from his negligence is still operative, and which, without more being shown, would compel him to bear the loss, would it be competent for him to show that such loss would have occurred in any event and though he had not committed the fault or been guilty of the negligence? Suppose, for instance, that he has unnecessarily deviated from the usual and proper route, which has caused delay, or that, without deviating, he has improperly delayed upon his journey, or has failed for an unreasonable time to put the goods in transit, and during such deviation or the delay caused thereby, or that

23. 4 Camp. 112.
24. 6 Bing. 716.
25. Express Co. *v.* Kountze, 8 Wall. 342.
26. Southern Express Co. *v.* Womack, 1 Heisk. 256; Holladay v. Kennard, 12 Wall. 254.

upon any part of his route after the improper delay or failure to ship the goods in reasonable time, they are lost by a flood or a tempest, would he be permitted to show that the same loss would, in all human probability, have occurred or must have occurred even had he done his whole duty, and thus bring himself within the benefit of the exception of the acts of God? It is certain that it will be no answer to the action to say that the loss *might* have occurred even if there had been no deviation, delay, disobedience of instructions, or other fault or carelessness on his part. In Davis *v.* Garrett,[27] as we have seen, the contention was that the deviation by the master of the vessel was not a cause of the loss sufficiently proximate to entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the vessel had proceeded in her direct course. The answer to this was that no wrong-doer can be allowed to apportion or qualify his own wrong, and that as a loss had actually happened whilst his wrongful act was in operation and force, and which was attributable to his wrongful act, he could not set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. "It might admit of a different construction," it was said, "if he could show not only that the same loss *might* have happened but that it *must* have happened if the act complained of had not been done."

Sec. 321. (§ 210.) Same subject.—But can it ever be made certain that the same loss would have happened if there had been no deviation or delay? It certainly cannot be predicated of any voyage that it is the same as if it had been commenced at a different time, or that, notwithstanding a deviation, it is the same that it would have been; or that the goods transported in a certain way or at a certain time would have been exposed to exactly the same dangers to which they were exposed when transported in another way or at another time. It is impossible to say with certainty that every circumstance of time, place, weather and exposure to peril of every kind would have been the same, and the question whether they would have been must

27. 6 Bing. 716; *ante*, § 295.

necessarily be one of speculation, with more or less approach to certainty according to circumstances. Hence it has been held that deviation (and for that purpose delay is deviation) absolutely discharges the insurer from his obligation. "If the chance is varied or the voyage altered by the fault of the owner or master of the ship, the insurer ceases to be liable."[28] If, therefore, the owner of the goods has insured them against loss by the act of God or the public enemy, and loses the benefit of his policy by the fault or negligence of the carrier, the latter must make good to him his loss; and if, instead of insuring, he chooses to take upon himself the risk of such losses, the carrier would seem to be liable to him upon the same principle. The exact question, however, seems never to have been settled by the authorities.[29]

Sec. 322. (§ 210a.) Effect of war on contract of carriage.—Another excuse which the law allows the carrier for the non-performance of his contract for the transportation of the goods should be here alluded to. If after having entered into such a contract, hostilities should commence between his country and that to which the goods are to be carried, it would operate as a legal prohibition upon its execution and its non-performance would of course be excused. The object of belligerents being to cripple each other's commerce, war of itself operates as an interdiction of commercial intercourse, and will dissolve all contracts of affreightment for the carriage of goods from one to the other. And this will be the effect without any formal declaration of war.[30] But this does not relieve the carrier from his duty to

28. Lord Mansfield in Pelly *v.* Royal, etc., Ass. Co., 1 Burr. 341.

29. Story on Bail. § 413d.

30. The Prize Cases, 2 Black, 635; The Teutonia, L. R. 3 Adm. 394; Esposito *v.* Bowden, 7 El. & Bl. 762; 4 *id.* 963; Reid *v* Hoskins, 5 *id.* 729; *s. c.* 6 *id.* 953; Baker *r.* Hodgson, 3 M. & Sel. 267; Griswold *v.* Waddington, 16 Johns. 438; Montgomery *v.* The United States, 15 Wall. 395; United States *v.* Grossmayer, 9 *id.* 73; The United States *v.* Lapene, 17 *id.* 601; Mitchell *v.* The United States, 21 *id.* 350.

But a declaration of war will not dissolve a shipping contract between domestic ports. It is only where hostilities exist between the country to which the vessel belongs and the country for which

preserve the goods for the owner; and if the restraint be merely temporary, as an embargo, the contract will not be dissolved, and after its removal must be performed as though it had not intervened.[31]

Sec. 323. Same subject—Contraband goods.—If the goods accepted for transportation are consigned to a point in a country between which and another country hostilities are threatened, and war is later declared, the fact that the goods are contraband of war, and that to proceed to destination would subject them to seizure and confiscation, will justify the carrier in refusing to proceed further on the journey and excuse him from a performance of the contract of carriage. And if he have on board the goods of other shippers, and such goods are not contraband of war, he may, in order to be able to proceed safely to destination, unload the contraband goods; and if proper precautions are taken with respect to their safe keeping, he will not thereby incur liability.[32]

IV. CARRIER NOT LIABLE FOR LOSSES FROM THE ACTS OF THE PUBLIC AUTHORITY.

Sec. 324. (§ 210b.) Carrier protected if loss caused by public authority. Like every other person, the carrier is bound, both by duty and necessity, to respect and yield to the paramount public authority in power at the place where his undertaking is to be performed.[33] If, therefore, without his fault or neglect, the goods are lost or injured by the act or mandate of

it is bound that such a result ensues. Graves *v.* Steamship Co., 29 Misc. Rep. 645, 61 N. Y. Supp. 115.

31. Hadley *v.* Clarke, 8 T. R. 259; Bork *v.* Norton, 2 McLean, 422.

32. Nobel's Explosives Co. *v.* Jenkins, 2 Q. B. (1896) 326, 65 L. J. Q. B. 638; The Styria, 101 Fed. 728, 41 C. C. A. 639, *reversing* 93 Fed. 474.

33. But the voluntary relinquishment of vessels to the government in time of war will not dissolve contracts of affreightment. Governmental compulsion may excuse performance but the voluntary act of the carrier cannot have that effect. Graves *v.*

the public authority, the carrier should be excused, and such is the rule of law. Thus—

Sec. 325. (§ 210c.) Same subject—Destruction or injury under police power.—If the goods, without his fault, are or become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority, as in the case of the seizure or destruction of goods infected with contagious diseases, or of intoxicating liquors intended for use or sale in violation of law, the carrier cannot be held liable.[34] But the officer seizing the goods must be vested with the proper legal authority to do so. If, therefore, he seize them without the proper legal process, he will be a mere trespasser and the carrier will be liable for his act.[35]

Sec. 326. (§ 210d.) Same subject—Confederate authority.—As in the case of a loss by the public enemy,[36] it is sufficient for the protection of the carrier under this rule that the loss was by the act or mandate of the paramount public authority at the time being. Thus the destruction of property by the act of the Confederate government in a state subject to its authority was held to excuse the carrier from his liablity.[37]

Sec. 327. (§ 210e.) Same subject—Seizure under legal process.—Within the same line and for the same reasons, the carrier will be excused if the goods are taken from him by legal process against the owner—a subject which will hereafter be more fully discussed.[38] Says Campbell, C. J.: "Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal and to accept all the consequences of resisting officers of the

Steamship Co., 29 Misc. 645, 61 N. Y. Supp. 115.

34. Wells *v.* Steamship Co., 4 Cliff. 228; Bliven *v.* Railroad, 35 Barb. 191, 36 N. Y. 407. See, also, Kidd *v.* Pearson, 128 U. S. 1; License Cases, 5 How. 504; Mugler *v.* Kansas, 123 U. S. 623; Railroad Co. *v.* Husen, 95 U. S. 465; Railway Co. *v.* Heymann, 118 Ga. 616, 45 S. E. Rep. 491, citing Hutchinson on Carr.

35. Bennett *v.* Express Co., 83 Me. 236, 22 Atl. Rep. 159.

36. See *ante*, § 317.

37. Nashville, etc., R. Co. *v.* Estes, 10 Lea, 747.

38. See *post*, § 738 *et seq.*

law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority.''[39]

To entitle the carrier to protection under this rule, however, the process must be at least fair upon its face,[40] and must be issued against the owner of the goods.[41]

V. CARRIER NOT LIABLE FOR LOSSES CAUSED BY ACT OF THE OWNER OF THE GOODS.

Sec. 328. (§ 211.) Exception to liability on the ground of the fraud of the owner of the goods.—As has been seen, the rule so often repeated as to have grown into a maxim, that the carrier without any limitation of his liability by contract can be excused only by the act of God or of the king's enemy, is not strictly accurate, inasmuch as it fails to include, among other losses already considered, those arising from the fraud or fault of the owner of the goods. It has often been decided that losses so caused do not fall upon the carrier but must be borne by the owner himself. Fraud vitiates and annuls all contracts; and if the owner of the goods has by his own imprudence or meddling brought the loss upon himself, it would be an imputation upon the justice of the law to say that it should be borne by another. It is an elementary principle that every man must bear the consequences of his own fraud and folly, and there is no reason for an exception to the rule as between the carrier and his employer. It was notwithstanding held in one of the earliest cases reported upon the subject of the liability of the carrier that he was responsible, although the owner of the goods had practiced a gross fraud upon him by representing a box delivered for carriage as containing only a book and some tobacco when in fact it contained also a large amount of money. The box was lost, and Rolle, J., held that as the carrier had not

39. In Pingree *v.* Railroad Co., 66 Mich. 143.

40. See *post*, § 742.

41. See *post*, § 741.

made a special acceptance of the box, he was liable for the loss of the money.

Sec. 329. (§ 212.) Same subject.—But in a similar case, in which the attempt was made to hold the carrier liable for money delivered to him concealed in a bag filled with hay, although he had given notice that he would not be liable for money or valuables unless notice was given that they were contained in the package delivered to him to be carried, and with the payment of a higher price for the carriage accordingly, the object of the owner of the money being of course to impose upon and cheat the carrier, and by practicing a deceit to have the money carried without paying the price which he was entitled to, Lord Mansfield could not agree with the ruling of Rolle, and held that the plaintiff could not recover because of the fraud.[1] And this opinion has been followed in numerous cases since that time both in this country and in England.[2]

Sec. 330. (§ 213.) Same subject—Neglect or failure to disclose contents or value.—Fraud may be as effectually practiced upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package and the nature of its contents, if there be anything in its form, dimensions or other outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled. For by such deception the carrier is thrown off his guard, and

1. Gibbon *v.* Paynton, 4 Burr. 2298.

2. Batson *v.* Donovan, 4 B. & Ald. 21; Crouch *v.* Railway Co., 14 C. B. 255; Relf *v.* Rapp, 3 Watts & S. 21; Edwards *v.* Sherratt, 1 East, 604; Southern Ex. Co. *v.* Everett, 37 Ga. 688; The Ionic, 5 Blatch. 538; Phillips *v.* Earle, 8 Pick. 182; The St. Cuthbert, 97 Fed. 340.

neglects to give to the package the care and attention which he would have given it had he known its actual value.[3]

Sec. 331. (§ 214.) Same subject—Extent of carrier's liability.—And if, under such circumstances, money or other valuables, concealed in a package, be lost by his negligence or carelessness, it would be unjust to charge him with their full value, because such concealment would be a fraud upon him as respects his compensation for the carriage, and a deception as to the degree of care which the package required and with which he would have guarded it had he been told the truth; as where money or jewels or other articles of great value are put into a valise or box which is generally used to contain things of comparatively small value, and delivery made to the carrier without informing him of the contents, there being nothing in the appearance of the valise or box to indicate or to apprise the carrier that it was of more than ordinary value, it would be an imposition upon him, and the law will not lend its aid in such a case to make him accountable for the money or other valuable contents if they should be lost.[4]

3. See *post*, §§ 795, 425-441; Warner *v.* The W. T. Co., 5 Robt. (N. Y.) 490; Orange County Bank *v.* Brown, 9 Wend. 85; Pardee *v.* Drew, 25 Wend. 459; Shaacht *v.* Railroad Co., 94 Tenn. 658, 30 S. W. Rep. 742, 28 L. R. A. 176, citing Hutchinson on Carr. Bottum *v.* Railway Co., — S. Car. —, 51 S. E. Rep. 985, citing Hutchinson on Carr.

The silence of the shipper touching the character and value of goods contained in a package which does not indicate that its contents are of great or unusual value, may, even in the absence of an inquiry by the carrier or of an actual intent by the shipper to defraud, absolve the carrier from liability on account of the loss or destruction of the contents. Express Co. *v.* Wood, 98 Ga. 268, 25 S. E. Rep. 436.

4. Chicago, etc., R. R. Co. *v.* Thompson, 19 Ill. 578; Oppenheimer *v.* The U. S. Ex. Co., 69 *id.* 62; Chicago, etc., R. R. *v.* Shea, 66 *id.* 471; Hayes *v.* Wells, 23 Cal. 185; Southern Ex. Co. *v.* Everett, 37 Ga. 688; Houston, etc., R. Co. *v.* Burke, 55 Tex. 323; Magnin *v.* Dinsmore, 56 N. Y. 168; 62 *id.* 35; 70 *id.* 410; Gorham Mfg. Co. *v.* Fargo, 35 N. Y. Super. 434; Michalitschke *v.* Express Co., 118 Cal. 683, 50 Pac. Rep. 847. But see Rice *v.* Railroad Co., 3 Mo. App. 27.

Sec. 332. (§ 215.) Same subject—Illustrations.—A leading case upon this subject is that of Orange County Bank *v.* Brown,[5] which was an action against the owners of a steamboat for the loss of a trunk belonging to a passenger. It was proven that the trunk contained a large amount of money, of which no notice was given to any of the officers of the boat, and for the carriage of which no remuneration was paid to the carrier at all commensurate with its value. It was contended for the plaintiff that, notwithstanding these facts, the defendants were liable, by the strict rules of the common law in regard to the responsibility of carriers, for the full value of the trunk including the money it contained. It was admitted by the learned judge who delivered the opinion in the case that no notice having been given limiting their liability or imposing any conditions upon the owner of the goods to disclose their value, it became their duty, if they desired to be informed of such value, to make inquiry, which the owner would be bound to answer truly at his peril; and, having accepted the goods for carriage without seeking such information and without qualification, they would be presumptively liable as common carriers upon common-law principles for their full value. But it was further said that if any means were used to conceal the value of the article, and thereby the owner avoids paying a reasonable compensation for the risk, such unfairness and its consequences to the defendants, upon principles of common justice as well as those peculiar to this action, would exempt them from the responsibility; for such a result would be alike due to the defendants who have received no reward for the risk and to the party who has been the cause of it by means of disingenuous and unfair dealing. It was therefore held that the delivery of the trunk without any information as to its more than ordinarily valuable contents, inducing the impression that it contained only the ordinary baggage of a passenger, and with the failure to compensate the carriers for their extraordinary risk, was a fraud upon them, and that the plaintiff could not recover. And in the case of Shaacht *v.* The

5. 9 Wend. 85.

Railroad,[6] the plaintiff delivered to the defendant's agent, together with other freight, a basket containing a quantity of silverware and other material intended for use in business at destination. The basket was covered and tied and had the general appearance of containing only household goods. The defendant's agent on receiving the goods cried out to his assistant that the goods were household goods, and the plaintiff, who was standing nearby, heard the remark but said nothing. The goods were sent forward by freight and the rate charged was a fourth class freight rate, which was the usual charge for carrying household goods. When the goods arrived at destination, the basket and its contents were missing. It was held that the action of the plaintiff in remaining silent and assenting to the statement that the basket contained household goods, as well as the manner in which the goods were packed, was a constructive, if not an actual, fraud on the carrier, and that the plaintiff could not therefore recover.

Sec. 333. (§ 216.) Exception to liability in case of loss from the intermeddling or mistake of the owner of the goods.—So where the owner of the goods has accompanied them and has meddled with them while in the carrier's custody,[7] or has undertaken to direct how they shall be carried;[8] or has unskilfully packed or loaded them;[9] or has negligently performed his un-

6. 94 Tenn. 658, 30 S. W. Rep. 742, 28 L. R. A. 176.

7. As where, without the carrier's knowledge, the owner of a horse in transportation left a car window open through which the horse escaped and was killed (Hutchinson *v.* Railway Co., 37 Minn. 524); and, in a like case, where the owner insisted upon having the car door left open and would not permit the carrier's servants to close it. Roderick *v.* Railroad Co., 7 W. Va. 54.

Where the shipper of live stock places his stock in a pen provided by the carrier for stock awaiting transportation, and negligently fails to secure a gate to the pen, and in consequence the stock escape, the carrier is not liable. Railway Co. *v.* Law, 68 Ark. 218, 57 S. W. Rep. 258.

8. As where the owner selects his own place and disposes of his property for carriage according to his own ideas. White *v.* Winnissimmett Co., 7 Cush. 155; Wilson *v.* Hamilton, 4 Ohio St. 722.

9. Rixford *v.* Smith, 52 N. H. 355; Miltimore *v.* Railroad Co., 37 Wis. 190; Ross *v.* Railroad Co.,

dertakings in respect to the carriage;[10] or has misdirected them,[11] in all these cases the carrier will be exonerated from all liability for losses which result from such intermeddling or carelessness of the owner. So it has been held that where a package contains articles of a brittle nature, and the carrier is not informed of the fact or in any way cautioned as to the degree of care to be exercised by him on that account, he will not be held liable for any damage they may have suffered by breakage, provided he has handled them with ordinary care.[12] But in order that the carrier may be excused where the fault or mistake of the owner has been instrumental in causing the loss, he himself must not have been at fault. The unaided negligence of the owner, where it occasions the loss, will preclude him from the right to a recovery. But if the carrier himself has been guilty of some negligent act or omission without which, notwithstanding the fault of the owner, the loss would not have occurred, he will be liable.[13]

49 Vt. 364; Klauber *v.* Express Co., 21 Wis. 21; Railway Co. *v.* Klepper (Tex. Civ. App.), 24 S. W. Rep. 567; Payne *v.* Ralli, 74 Fed. 563; Goodman *v.* Navigation Co., 22 Ore. 14, 28 Pac. Rep. 894; Cohn *v.* Platt, 95 N. Y. Supp. 535, 48 Misc. 378.

Where the owner of live stock undertakes to load the stock himself, he cannot recover for injury to the animals caused by the negligent manner in which the car was loaded. Fordyce *v.* McFlynn, 56 Ark. 424, 19 S. W. Rep. 961; Texas, etc., Ry. Co. *v.* Edins (Tex. Civ. App.), 83 S. W. Rep. 253; Ficklin & Son *v.* Railroad Co., — Mo. App. —, 92 S. W. Rep. 347.

10. Miltimore *v.* Railroad Co., *supra;* Roderick *v.* Railroad Co., *supra;* Betts *v.* Farmers', etc., Co., 21 Wis. 80; Lee *v.* Railroad Co., 72 N. C. 236. See, also, Bohannon *v.* Hammond, 42 Cal. 227; Smith *v.* Smith, 2 Pick. 622; Brownell *v.* Flagler, 5 Hill, 282.

11. See as to this, § 677; Congar *v.* Railroad Co., 24 Wis. 157; Lake Shore R. Co. *v.* Hodapp, 83 Penn. St. 22.

12. American Ex. Co. *v.* Perkins, 42 Ill. 458.

13. McCarthy *v.* Railroad Co., 102 Ala. 193, 14 So. Rep. 370, 48 Am. St. Rep. 29.

VI. CARRIER NOT LIABLE FOR LOSSES CAUSED BY THE INHERENT NATURE OF THE GOODS.

Sec. 334. (§ 216a.) Nature of the exception.—So, obviously, the carrier, if not himself at fault, cannot be held liable for losses which have been caused by the inherent nature, vice, defect or infirmity of the goods themselves, as in the case of decay, waste or deterioration of perishable fruits, the evaporation of liquids, the bursting of vessels owing to the fermentation of their contents,[14] the natural death of an animal, the vicious or uncontrollable nature of live stock, and the like.[15] An interesting case on the subject is that of Lister *v.* The Railway Company.[16] It there appeared that the plaintiff employed the defendant as a common carrier to transport an engine from his yard to a neighboring station. The engine was on wheels and had shafts attached by which it could be drawn. While proceeding along the highway one of the shafts broke, causing the horses attached to the engine to take fright, and the engine was upset and damaged. The break was due to a defect in the shaft, which could not have been discovered by any ordinary examination. The county judge decided that since the shaft would not have been broken but for the strain put upon it by the defendant's own act, its defective condition was no excuse. On appeal this decision was reversed, Lord Alverstone saying: "It may be that if there is no evidence of intention by the parties as to how the thing is to be carried, and there are alternative

14. Faucher *v.* Wilson, 68 N. H. 338, 38 Atl. Rep. 1002, 39 L. R. A. 431.

15. Louisville, etc., R. Co. *v.* Bigger, 66 Miss. 319; Illinois Cent. R. Co. *v.* Brelsford, 13 Ill. App. 251; Warden *v.* Greer, 6 Watts, 424; Swetland *v.* Railroad Co., 102 Mass. 276; Lawrence *v.* Denbreens, 1 Black, 170; Howard *v.* Wissman, 18 How. 231; Cragin *v.* Railroad Co., 51 N. Y. 61; Kendall *v.* Railway Co., L. R. 7 Ex. 373; Cooper *v.* Railroad Co., 110 Ga. 659, 36 S. E. Rep. 240, citing Hutchinson on Carr.

16. 1 K. B. (1903) 878, 72 L. J. K. B. 385, 88 Law T. 561, 52 Wkly. Rep. 12.

modes of carriage, one of which will give play to an inherent defect in the thing carried and the other of which will not, the carrier will be responsible if he adopts the former mode and damage results therefrom, unless, indeed, the adoption of the safer mode would involve the taking of precautions which it would be altogether unreasonable to require. But that is not the case here. It is obvious that all parties intended that the engine should be taken to the station on its own wheels. The county court judge, in thinking that the rule as to the non-liability of a common carrier for damage caused by an inherent defect in the thing carried, was limited to cases in which the damage would equally have occurred if the thing had not been carried at all, in my opinion went too far.''

VII. EXCEPTION IN THE CASE OF LIVE ANIMALS.

Sec. 335. (§ 217.) Live animals not regarded as goods.— The exception to the liability of the carrier, allowed when the subject of the carriage consists of living animals, deserves fuller consideration. It would of course be unreasonable to impose upon him the same absolute responsibility for the safety of such animals as for inanimate goods. It has indeed been very much questioned whether, in the transportation of live animals, the carrier can be considered in any respect as undertaking the service as a common carrier. Live stock, though the subject of property, cannot be regarded as goods in the carriage of which the office of the common carrier consists. There is between them and the ordinary commodities of commerce, in the transportation of which the common carrier is principally employed, something of the same difference which exists between the bale of inanimate goods and the human being who is carried neither as a passenger nor as freight, but who, ''in the nature of things and in his character,'' resembles a passenger, and not a package of goods, and as to whom the responsibility of the carrier must be meas-

ured by the law applicable to passengers rather than by that which is applicable to the carriage of common goods.[17]

Sec. 336. (§ 218.) Difference in liability based on inherent nature.—The liability of the common carrier of animals, it is said, is essentially different from that of the carrier of merchandise or of inanimate property. While common carriers are insurers of inanimate goods against all loss and damage except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance and care.[18] In the transportation of live stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur from or in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation, or they may die from heat or cold. In all cases, therefore, where injuries occur by reason of the inherent vices or natural propensities of the animals themselves, the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires.[19]

17. Boyce *v.* Anderson, 2 Pet. 150; Williams *v.* Taylor, 4 Port. 234; Clark *ads.* McDonald, 4 McCord, 223; Lewis *v.* Railroad Co., 70 N. J. Law, 132, 56 Atl. Rep. 128.

18. Penn *v.* The Railroad, 49 N. Y. 204; Clark *v.* The Railroad, 14 *id.* 570; Mich., etc., R. R. *v.* McDonough, 21 Mich. 165; Bissell *v.* The Railroad, 25 N. Y. 442; Smith *v.* The Railroad, 12 Allen, 531; Louisville, etc., R. Co. *v.* Bigger, 66 Miss. 319; Illinois Cent. R. Co. *v.* Brelsford, 13 Ill. App. 251; Chicago, etc., Ry. Co. *v.* Harmon, 12 Ill. App. 54; Lewis *v.* Railroad Co., *supra;* Waldron *v.* Fargo, 170 N. Y. 130, 62 N. E. Rep. 1077; Cooper *v.* Railroad Co., 110 Ga. 659, 36 S. E. Rep. 240, citing Hutchinson on Carr.

19. Cragin *v.* The Railroad, 51 N. Y. 61; Burke *v.* Express Co., 87 Ill. App. 505; *s. c.* 94 Ill. App. 29, citing Hutchinson on Carr. Lackland *v.* Railway Co., 101 Mo. App. 420, 74 S. W. Rep. 505, citing Hutchinson on Carr. Railway Co. *v.* Woodward, 164 Ind. 360, 72 N. E. Rep. 558; rehearing denied, 73 N. E. Rep. 810; Coupland *v.* Railroad Co., 61 Conn. 531, 23 Atl. Rep. 870, 15 L. R. A. 534.

And the opinion has been frequently expressed that, owing to these peculiarities of such freight, the carrier in its transportation was not to be considered as assuming the responsibilities of the common carrier, and that it was always competent for him to make his own terms upon which he would consent to carry it.[20]

Sec. 337. (§ 219.) Same subject.—The question was somewhat discussed in the case of Blower *v.* The Railway,[21]

In Boehl *v.* Railway Co., 44 Minn. 191, 46 N. W. Rep. 333, it is said by Vanderburgh, J.: "Carriers of live stock are liable as common carriers for damages or injuries thereto arising during the transportation, except such as, without the fault or negligence of the carrier, result from the vitality of the freight; that is to say, the nature and propensity of animals to injure themselves or each other, their unruliness, restiveness, fright, viciousness, kicking, or goring, etc. The carrier is relieved from liability for injuries from such causes if he has provided suitable means of transportation, and exercised that degree of care which the nature of the property requires, or has not otherwise contributed to the injury. Of course, the carrier is relieved from special care and oversight of the animals where the owner or agent accompanies them for that purpose. Ang. Carr. § 214 *et seq.;* Hutch. Carr. § 217; Clarke *v.* Railroad Co., 67 Am. Dec. 210; Evans *v.* Railroad Co., 111 Mass. 191; 3 Am. & Eng. Enc. Law, 6; Moulton *v* Railway Co., 31 Minn. 85, 16 N. W. Rep. 497; 2 Wait, Act. & Def. 32. But if the injury or loss arise in whole or in part from the carrier's negligence, without the fault or concurring negligence of the owner or his agent, or from extrinsic causes other than inevitable accident, the carrier is liable as in other cases. And it is enough to make a *prima facie* case against him that the owner allege and show the delivery of the property to the carrier, and the nature of the loss or damage suffered during its transit. It will then devolve on the carrier to show that such injury was caused without his fault, and from the inherent nature or propensity, or 'proper vice,' as it is sometimes called, of the animals transported. Shriver *v.* Railroad Co., 24 Minn. 507; Lindsley *v.* Railway Co., 36 Minn. 539, 33 N. W. Rep. 7; Hull *v.* Railway Co., 43 N. W. Rep. 391. The carrier, therefore, needs no special contract limiting his liability in respect to injuries resulting to animals from such causes."

20. Per Pollock, C. B., and Martin, B., in Pardington *v.* The Railway Co., 1 H. & N. 396; Erle, J., in McManus *v.* The Railway, 4 *id.* 347; Parke, B., in Carr *v.* The Railway, 7 Exch. 711.

21. L. R. 7 C. P. 655.

in which the attempt was made to hold the railway company liable for the value of a bullock which was lost by its escape from a truck on which he was being carried, without any negligence, however, on the part of the company, it being proven that the truck was reasonably sufficient for his conveyance. "Whether a railway company," said Willes, J., "are common carriers of animals is a question upon which there has been much conflict of opinion, and although there may be difficulties in determining that question, such as induced Lord Wensleydale, in Carr *v.* the Lancashire & Yorkshire Railway Company[22] to make the observations which have elicited remarks from some learned judges apparently to the contrary, it may turn out after all to be a mere controversy of words. The question as to their liability may turn on the distinction between accidents which happen by reason of some vice inherent in the animals themselves, or a disposition producing unruliness or phrensy, and accidents which are not the result of inherent vice or unruliness of the animals themselves. It comes to much the same thing whether we say that one who carries live animals is not liable in one event but is liable in the other, or that he is not a common carrier of them at all, because there are some accidents, other than those falling within the exception of the act of God or of the queen's enemies, for which he is not responsible. By the expression 'vice,' I do not of course mean moral vice in the thing itself or its owner, but only that sort of vice which, by its internal development, tends to the destruction or the injury of the animal or thing to be carried. If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties. This becomes the more clear when we consider the reason why a common carrier is liable for a loss happening without any negligence at all on his part unless in the case of the act of God or the queen's enemies. The reason is so well known and so well explained by Lord Wensleydale in Wyld *v.* Pickford,[23] that it is unnecessary to add anything or to

22. 7 Exch. 707.

23. 8 M. & W. 443.

heap up authorities on the subject. A common carrier is liable as an ordinary bailee for negligence; and he is liable for loss occasioned by negligence even though the act of God or of the queen's enemies conduce to the loss. But he is further liable, as an insurer, for losses which accrue through no negligence on his part. It is only necessary, therefore, to observe that an insurer is not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes. This is well explained in Smith's Mercantile Law, where it is said that underwriters are not liable for a loss which is necessarily incidental to the property rather than occasioned by adventitious causes, such as loss by worms or rats or the self-ignition of damaged hemp.''[24] So in Brass *v.* Maitland,[25] goods were delivered to a ship-owner to be carried, but were so packed as to conceal their real character, and in consequence of the insufficiency of the packages, other parts of the cargo were injured, and it was held by a majority of the court of queen's bench that an action lay against the shippers. That case was followed by Hutchinson *v.* Guion,[26] and Hearne *v.* Garton,[27] and the same law was laid down in Alston *v.* Herring,[28] with regard to goods causing corruption to themselves. The rule is very accurately laid down to the same effect in Story on Bailments,[29] where the authorities are all collected.

Sec. 338. (§ 220.) Same subject.—And in Kendall *v.* The Railway,[30] decided immediately afterwards in the exchequer chamber, the case being that of a horse which in the course of the transportation was injured, Bramwell, B., stated the law as follows: ''No doubt the horse was the immediate cause of its own injuries, *i. e.*, no person got into the box and injured it. It slipped, or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, its proper vice, that is from fright, or temper, or

24. Rohl *v.* Parr, 1 Esp. 444; Hunter *v.* Potts, 4 Camp. 203; Boyd *v.* Dubois, 3 *id.* 133.
25. 6 El. & B. 470.
26. 5 Com. B. (N. S.) 149.
27. 2 E. & E. 66.
28. 11 Exch. 822.
29. § 492a.
30. L. R. 7 Exch. 373.

struggling to keep its legs, the defendants are not liable. But if it so hurt itself from the defendant's negligence or any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the line through some obstruction maliciously laid upon it, then the defendants, as insurers, would be liable. If perishable articles, say soft fruits, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable."

Sec. 339. (§ 221.) Carrier liable as common carrier of animals except for losses caused by their peculiar nature.— These cases have been considered as establishing in the English law the principle, whatever doubts might have been previously cast upon the question by the opinions of learned judges, that the carriers of live animals incur the responsibilities of common carriers as to such freight; but that, at the same time, where an injury has happened to them, it is competent for the carrier to show that it occurred through the "proper vice" of the animal and not from any negligence on his part. And in this country, with greater unanimity, the duty and liability of the common carrier as to such freight have been defined with exactly the same limitations and exceptions.[31] And it has been

31. In Kansas Pacific R. R. Co. *v.* Nichols, 9 Kan. 235, the court said: "That railroads are *created* common carriers of some kind, we believe, is the universal doctrine of all the courts. The main question is always whether they are common carriers of the particular thing then under consideration. The question in this case is whether they are common carriers of cattle. So far as our statutes are concerned no distinction is made between the carrying of cattle and that of any other kind of property. Under our statutes a railroad may as well be a common carrier of cattle as of goods, wares and merchandise or of any other kind of property. Now, as no distinction has been made by statute between the carrying of the different kinds of property, we would infer that railroads were created for the purpose of being common carriers

said that the rule of the responsibility of the common carrier of goods must be applied to the transportation of this kind of property, modified as far only as may be necessary owing to

of all kinds of property which the wants or need of the public require to be carried, and which can be carried by railroads; and particularly we would infer that railroads were created for the purpose of being common carriers of cattle. As Kansas and all the surrounding states and territories, with their boundless prairies and nutritious grasses, are destined to be the great stock-growing countries, it can scarcely be supposed that the legislature, in providing common carriers for the property of the public, should have omitted to provide for one of the most important kinds of property, a vast source of unbounded wealth. We have no navigable streams within the boundaries of Kansas upon which to transport cattle, and hence they must be transported by railroad, if transported by any means except by driving them on foot. It is claimed, however, that 'the transportation of cattle and live stock by common carriers *by land* was unknown to the common law.' Suppose it was; what does that prove?

"The transportation of thousands of other property, either by land or water, was unknown to the common law, and yet such kinds of property are now carried by common carriers and by railroads every day. We get our common law from England. It was brought over by our ancestors at the earliest settlement of this country. It dates back to the fourth year of the reign of James I., or 1607, when the first English settlement was founded in this country at Jamestown, Virginia. The body of the laws of England as they then existed now constitute our common law. It is so fixed by statute in this state (Comp. Laws, 678; Gen. Stat. 1127, § 3), and is generally so fixed by statute or by judicial decisions in the other states. The reason why cattle and live stock were not transported *by land* by common carriers at common law was, because no common carrier at the time our common law was founded had any convenient means for such transportation. Among the other kinds of property not transported by common carriers, either by land or water, at the time our common law was formed, are the following: Reapers, mowers, wheat drills, corn planters, cultivators, threshing machines, corn shellers, gypsum, guano, Indian corn, potatoes, tobacco, stoves, steam engines, sewing machines, washing machines, pianos, reed organs, fire and burglar proof safes, etc.; and yet no one would now contend that railroads are not common carriers of these kinds of articles. At common law the character of the carrier was never determined by the kind of property that he carried. He might have been a private or special carrier of goods, wares and merchandise, or of any other

its peculiar character, and that the fact that the carriage of live stock was unknown when this rule of liability becomes fixed upon the carrier is answered by the consideration that

kind of property, or he might have been a public or common carrier of cattle, live stock, or any other kind of property just as he chose. All personal property was subject to be carried by a common carrier, and no personal property was exempt. Whether a person was a common carrier depended wholly upon whether he held himself out to the world as such, and not upon the kind of property that he carried.

"A common carrier was such as undertook 'generally' and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price." 2 Kent Com. 598. And he could hold himself out as a common carrier by engaging in the business generally, or by announcing or proclaiming it to the world by the issuing of cards, circulars, advertisements, etc., or by any other means that would let the public know that he intended to be a common or general carrier for the public. Railroads hold themselves out as common carriers by an act irrevocable on their part in their very creation and organization. The very nature of their business is such that by engaging in it, or offering to engage in it, they hold themselves out as common carriers. But let us return to the point more especially under consideration. At common law no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements, such as plows, harrows, etc.; if he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a carrier of bacon, lard and molasses. Funnel *v.* Pettijohn, 2 Harr. (Del.) 48. And it seems to us clear beyond all doubt, that if any person had, in England, prior to the year 1607, held himself out as a common carrier of cattle and live stock by land, the common law would have made him such. If so, where is the valid distinction that is attempted to be made between the carrying of live stock and the carrying of any other kind of personal property? The common law never declared that certain kinds of property only could be carrier by common carriers, but it permitted all kinds of personal property to be so carried. At common law, any person could be a common carrier of all kinds, or kind, and just such kinds of personal property as he chose, no more nor less. Of course, it is well known that at the time when our common law

the law must keep pace with the march of improvement by applying the rules already established to the changed condition of things.[32]

had its origin, that is, prior to the year 1607, railroads had no existence. But when they came into existence, it must be admitted that they would be governed by the same rules, so far as applicable, which govern other carriers of property. Therefore, it must be admitted that railroads might be created for the purpose of carrying one kind of property only, or for carrying all kinds of property which can be carried by railroads, including cattle, live stock, etc. In this state it must be presumed that they were created for the purpose of carrying all kinds of personal property. It can hardly be supposed that they were created simply for the purpose of being carriers of such articles only as were carried by common carriers under the common law prior to the year 1607; for if such were the case, they would be carriers of but few of the innumerable articles that are now actually carried by railroad companies, and it can hardly be supposed that they were created for the mere purpose of taking the places of pack horses, or clumsy wagons, often drawn by oxen, or such other primitive means of carriage and transportation as were used in England prior to that year. Railroads are undoubtedly created for the purpose of carrying all kinds of property which the common law would have permitted to be carried by common carriers in any mode, either by land or water, which probably includes all kinds of personal property. Our decision, then, upon this question is, that whenever a railroad company receive cattle or live stock to be transported over their road from one place to another, such company assume all the responsibilities of a common carrier except so far as such responsibilities may be modified by special contract."

32. *United States:* Hart *v.* Railroad Co., 112 U. S. 331.

Alabama: South, etc., R. R. Co. *v.* Henlein, 52 Ala. 606; Railroad Co. *v.* Smith, 85 Ala. 47; Railroad Co. *v.* Smitha, — Ala. —, 40 So. Rep. 117.

Arkansas: Fordyce *v.* McFlynn, 56 Ark. 424, 19 S. W. Rep. 961, citing Hutchinson on Carr.

Colorado: Railway Co. *v.* Rainey, 19 Colo. 225, 34 Pac. Rep. 986.

Georgia: Cooper *v.* Railroad Co., 110 Ga. 659, 36 S. E. Rep. 240; Railway Co. *v.* Hall, — Ga. —, 53 S. E. Rep. 679.

Illinois: Ohio, etc., R. R. Co. *v.* Dunbar, 20 Ill. 623; T. W. & W. R. Co. *v.* Hamilton, 76 Ill 393; Toledo, etc, R. Co. *v.* Thompson, 71 Ill. 434; St. Louis, etc., R. R. *v.* Dorman, 72 Ill. 504; Illinois Cent. R. R. *v.* Hall, 58 Ill. 409; Indianapolis, etc., R. Co. *v.* Jurey, 8 Ill. App. 160; Express Co. *v.* Bratton, 106 Ill. App. 563; Wabash R. Co. *v.* Johnson, 114 Ill. App. 545; Railroad *v.* Fox, 113 Ill. App. 180.

Sec. 340. Same subject—Cases holding contrary view.—In an early case,[33] however, the supreme court of Michi-

Indiana: Evansville, etc., R. R. *v.* Young, 28 Ind. 516.

Iowa: McCoy *v.* The Railroad, 44 Iowa, 424; Kinnick *v.* Railway Co., 69 Iowa, 665, 29 N. W. Rep. 772.

Kansas: Kansas, etc., R. R. Co. *v.* Reynolds, 8 Kan. 623; Railroad Co. *v.* Simpson, 30 Kan. 645; Railway Co. *v.* Clark, 48 Kan. 321, 329, 29 Pac. Rep. 312.

Maine: Sager *v.* The Railroad, 31 Me. 228; Dow *v.* Packet Co., 84 Me. 490, 24 Atl. Rep. 945.

Massachusetts: Smith *v.* The Railroad, 12 Allen, 531; Squire *v.* The Railroad, 98 Mass. 239; Evans *v.* The Railroad, 111 Mass. 142.

Minnesota: Moulton *v.* Railroad Co., 31 Minn. 85; Lindsley *v.* Railroad Co., 36 Minn. 539.

Mississippi: Railroad Co. *v.* Abels, 60 Miss. 1017.

Missouri: Ballentine *v.* The Railroad, 40 Mo. 491; McFadden *v.* Railway Co., 92 Mo. 343; Cash *v.* Railroad Co., 81 Mo. App. 109, citing Hutchinson on Carr.

Nebraska: Railroad Co. *v.* Williams, 61 Neb. 608, 85 N. W. Rep. 832, 55 L. R. A. 289, citing Hutchinson on Carr.; Chicago, etc., Ry. Co. *v.* Slattery, — Neb. —, 107 N. W. Rep. 1045.

New Hampshire: Rixford *v.* Smith, 52 N. H. 355.

New York: Harris *v.* The Railroad, 20 N. Y. 232; Clarke *v.* The Railroad, 14 N. Y. 570; Conger *v.* The Railroad, 6 Duer, 375; Penn *v.* The Railroad, 49 N. Y. 204; Cragin *v.* The Railroad, 51 N. Y. 61; Waldron *v.* Fargo, 170 N. Y. 130, 62 N. E. Rep. 1077.

North Carolina: Lee *v.* The Railroad, 72 N. Car. 236.

Ohio: Wilson *v.* Hamilton, 4 Ohio St. 722; Welsh *v.* The Railroad, 10 Ohio St. 72.

Tennessee: Baker *v.* Railroad Co., 10 Lea, 304; Railroad Co. *v.* Jackson, 6 Heisk, 271; Railroad Co. *v.* Hale, 85 Tenn. 69; Smitha *v.* Railroad Co., 86 Tenn. 198; Louisville, etc. R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. Rep. 311; Railroad *v.* Dies, 91 Tenn. 177, 18 S. W. Rep. 266, 30 Am. St. Rep. 871.

Texas: Missouri Pac. R'y Co. *v.* Harris, 67 Tex. 166.

Vermont: Kimball *v.* The Railroad, 26 Vt. 247.

Wisconsin: Betts *v.* The Farmers Loan Co., 21 Wis. 80; Ayres *v.* Railroad Co., 71 Wis. 372.

Under the Railway Act of Canada, 1888, a railroad company, when carrying animals, is a common carrier and subject to the obligations imposed by statute and common law on common carriers. McCormack *v.* Railway Co., 6 Ont. L. R. 577, 3 Canadian R'y Cases, 185.

33. Michigan S. R. R. *v.* McDonough, 21 Mich. 165. In this case, Christiancy, J., said: "For the purposes of this case it may be assumed that this company, by their charter and act of consolidation, are required to take upon themselves the business of common carriers, and to transport as such, all such property tendered to them for that purpose as was

gan held that live stock, on account of its being more susceptible to injury while being transported than property usually

naturally transported by railroads as common carriers at the date of the charter of the Michigan Southern Railroad Company in 1846, and any other kinds of property which in the progress of invention and business might be tendered for such carriage, which should not, from its nature, impose risks of a different character, or require an essentially different mode of managing their road or the incurring of extra expenses on account of the different character of such new kinds of property. But the transportation of cattle and live stock by common carriers by land was unknown to the common law when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the act of God or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property involving, in their transportation, much fewer risks and of quite a different kind from those which are incident to the transportation of live stock by railroad. Animals have wants of their own to be supplied; and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting and frequent concussions of the cars, in their frenzy injure each other by trampling, plunging, goring or throwing down, and frequently, on long routes, their strength exhausted by hunger and thirst, fatigue and fright, the weak easily fall and are trampled upon, and, unless helped up, must soon die. Hogs also swelter and perish. See, per Parke, B., in Carr *v.* The Lancashire & Yorkshire R'y, 7 Exch. 712; Denio, J., in Clarke *v.* The Rochester & S. R. R. Co., 14 N. Y. 573. It is a mode of transportation which but for its necessity would be gross cruelty, and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in reference to other kinds of property, that I do not think this kind of property falls within the reasons upon which the common-law liability of common carriers was fixed. In McManus *v.* The Lancashire R'y Co., 2 H. & N. 702, the court say: 'We are able to decide this case without referring to the second point made by the defendants, viz., the alleged distinction between the liability of carriers as to the conveyance of horses and live stock, and ordinary goods; but should the question ever arise, we think the observation which fell from Baron Parke in Carr *v.* The Lancashire & York Railway Company is entitled to much consideration.' In the same case on appeal in the Exchequer Chamber, 4 H. & N.

received for transportation, could not properly be considered as a commodity which under the common law the carrier was bound to transport subject to his liability as an insurer, and that he could neither be compelled to receive it in that capacity nor be

346, Erle, J., speaking of the condition of the contract in that case, says: 'This condition is imposed in respect of horses. And I find neither authority nor principle for holding that defendants were bound to receive living animals as common carriers.' In Palmer *v.* The Grand Junction R'y Co., 4 M. & W. 758, Parke, B., interrupting counsel, asks: 'Does the rule as to negligence apply to live animals, as horses? Of course, if they are stolen, it would; but is it so when they are delivered, although hurt or damaged? If misdelivered, the carrier would be liable, but they would not be liable for a mere accident to an animal, supposing the carriage to be safe, good and properly conducted.' This case was decided in 1839, when the question was comparatively a new one. And it is quite manifest that Baron Parke, in the above remarks, had reference to the question as one of common law merely, and when he comes to decide the case, holding that if the company chose to carry horses and do not take care to accept them with a limited responsibility, then, by accepting them, they must be held to have accepted as common carriers, it is equally manifest that the decision is rested wholly upon the statute which he cites, expressly enumerating 'cattle' with 'other goods, wares and merchandise, articles, matters and things' which the company were authorized to carry, placing all apparently upon the same ground. The conclusion from the statute would seem to have been quite as broad, at least, as the premises would warrant. But it had the statute, such as it was, to rest upon. It may, however, be well doubted whether the decision would have been the same if the question had arisen for the first time after the decision in Oxlade *v.* The Northeast R. Co., 15 Com. B. (N. S.) 680, to be hereafter noticed; and that of Pardington *v.* S. Wales Co., 38 Eng. L. & E. 432, decided in November, 1856. In the latter case, the question arose upon the reasonableness of a notice given by the company to a shipper of cattle under 17 and 18 Vict., ch. 31, § 7 (Railway Traffic Act of 1854), which expressly held the company liable for the loss of, or injury done to, any 'horses, cattle or other animals,' or to any goods, etc., unless the conditions fixed by the notices, etc., should be held by the court to be just and reasonable. Martin, B., says: 'The common-law liability of common carriers does not apply to cattle at all. In former days they were not carried. They might, therefore, but for the statutes, make what conditions they pleased.' Pollock, C. B., also says: 'Why should they not say, if you insist upon our carrying your cattle, we will carry them; but it must be upon

held responsible as such in case of its having been injured. This view of the carrier's liability in the carriage of live stock has been followed in the later cases, and the rule may now be considered as settled in that state that the acceptance of live stock by the carrier imposes the duty of exercising only ordinary care, skill and prudence and renders him responsible for only those

the terms that we shall not be responsible for any injury which may happen to them. They hold themselves out as carriers of horses and cattle *sub modo*.' The drovers went with the cattle (as in the present case), and Martin, B., in giving his judgment, says: 'I doubt the liability of the company at all, even if there had been no stipulation on their part; for the fault, if any, was the fault of those who went by the train with the cattle.'

"It will be noticed that in England, by the statute cited, railroad companies are common carriers of cattle, horses, etc., and bound to carry as such, if insisted upon by the shipper, except as they may limit their liability by notices or contracts which the courts hold reasonable, and that the statute cited in Palmer *v.* Grand Junction Co., 4 M. & W. 758, was then held to have the effect to make them common carriers of such property, if they accepted it without conditions. In that case, however, there was no evidence of their having held themselves out as doing such business *only* on special terms. But this case has been frequently cited in this country as if it had been made on common-law reasons only, and applied to cases where there was no such statute as that upon which it was clearly rested by the court. Thus (without enumerating other instances), in Kimball *v.* Rutland Co., 26 Vt. 247, the court, after very correctly holding that the company, by publicly offering to take cattle at one price with common-law liability, and at another and less rate when the owner assumes the risk, thereby held themselves out and became common carriers of cattle, proceed to cite this case of Palmer *v.* Grand Junction Company as proving the proposition that 'the fact that the company have undertaken such transportation for *hire* and for such persons as *choose to employ them*, establishes their relation as common carriers.' The remark was correct enough if applied to the facts of the case before them; but the language is much broader than is warranted by the case cited.

"Upon sound principle and upon the English authorities above cited, I think it clear the transportation of cattle by railroad does not come within the reasons of the law applicable to common carriers, so far as relates to the care of the property and responsibility for its loss or injury.

"Unless, therefore, there be something in the defendant's charter or the act of consolidation or some other statute applicable to the case, the company were not bound to receive or transport cat-

injuries occasioned by his negligence.[34] And so in the case of The Railroad Company *v.* Hedger,[35] which arose in Kentucky, it was said to be unreasonable to hold the carrier to the same strict accountability in the carriage of live stock that he was held to when inanimate property was accepted for transportation, and that he was therefore not liable unless it could be shown that the injury arose from his failure to exercise ordinary care; and the same conclusion was reached in the subsequent cases of The Railroad Company *v.* Harned[36] and The Railroad Company *v.* Wathen.[37] But in the later case of The Railway Company *v.* Sanders & Russell,[38] decided by the same court, no mention was made of the rule laid down in the earlier cases and the contrary doctrine was distinctly approved.

Sec. 341. (§ 222.) Carrier of animals is common carrier and not special agent of owner.—The carrier of living animals as freight is, however, by the great weight of authority to be regarded as a common carrier as to such freight, and not as a special agent of the owner for their transportation as has been sometimes contended. But as the law has introduced by implication into every contract for the carriage of goods, an exception to the carrier's liability in cases where the loss to them, whilst in his charge, has been occasioned by the act of God or of the public enemy, or by their own decay from an inherent infirmity, or by the fault of the owner himself, so it has from the necessity and justice of the case introduced an exception in favor of the carrier of live stock, of accountability for its loss or injury resulting from its own uncontrollable vicious propensities, and the damages incident to its carriage from its inherent natural character.[39] And this question as to the relation in which

tle or hogs as common carriers, but they might legally refuse to carry them in that or in any other capacity."

34. Lake Shore R. R. *v.* Perkins, 25 Mich. 329; Heller *v.* Railway Co., 109 Mich. 53, 66 N. W. Rep. 667, 63 Am. St. Rep. 541; McKenzie *v.* Railroad Co., 137 Mich. 112, 100 N. W. Rep. 260.

35. 9 Bush, 645, 15 Am. Rep. 740.

36. 23 Ky. Law Rep. 1651, 66 S. W. Rep. 25.

37. 23 Ky. Law Rep. 2128, 66 S. W. Rep. 714.

38. 25 Ky. Law Rep. 2333, 80 S. W. Rep. 488.

39. See, Keys-Marshall Bros. Livery Co. *v.* Railway Co., 105 Mo. App. 556, 80 S. W. Rep. 53, citing

the carrier stands to such freight is of more importance than might at first be imagined, as if he is to be treated in its transportation as a common carrier, he becomes an insurer, as in the case of other goods, against loss from every cause except the acts of God or of the public enemy or of the animals themselves, unless he has further protected himself by his contract, and in case of loss of or injury to the freight, the burden of proving

Hutchinson on Carr. In Richardson *v.* Railway Co., 61 Wis. 596, Cassoday, J., says: "Whether a railway company is under the same obligations to furnish cars for, and receive, safely carry, and store live stock as other ordinary inanimate freight, is a question upon which much has been written, and some diversity of opinion has been expressed. It is not necessary here to analyze the adjudged cases, nor indicate the weight of reason or authority.

"Betts *v.* Farmers' L. & T. Co., 21 Wis. 80, was an action for injuries caused by the carrier's negligence in carrying the plaintiff's cattle in a car with defective and imperfectly fastened doors which were thrown open by the motion of the cars so that the cattle escaped. The cattle were shipped under a special contract, which, among other things, provided that the company should 'not be liable for loss in jumping from the cars.' In that case, Dixon, C. J., giving the opinion of the court, said: 'As to this species of property we think it competent for the carrier to contract that the owner shall assume all risk of damage or injury, from whatsoever cause happening in the course of transportation.' See, also, C. & N. W. R. Co. *v.* Van Dresar, 22 Wis. 511; Morrison *v.* P. & C. Const. Co., 44 Wis. 405. This proposition seems to cover more ground than the point actually decided in that case, but the English cases cited by the learned chief justice seems to sustain the proposition. To them others may be added. M'Cance *v.* London & N. W. R'y Co., 7 Hurl. & N. 477; Gannell *v.* Ford, 5 Law T. Rep. (N. S.) 604; Robinson *v.* G. W. R'y Co., 35 L. J. C. P. 123; Harrison *v.* London, B. & S. R'y Co., 2 Best & S. 122; Manchester S. & L. R'y Co. *v.* Brown, 50 Law T. Rep. (N. S.) 281. But there are cases even in England which seem to hold a contrary doctrine. M'Manus *v.* Lancashire & Y. R'y Co., 4 Hurl. & N. 327; Allday *v.* G. W. R'y Co., 5 Best & S. 903; Gregory *v.* W. M. R'y Co., 2 Hurl. & C. (Exch.) 944; Rooth *v.* North Eastern R'y Co., L. R. 2 Exch. 173; Doolan *v.* Directors of M. R'y Co., L. R. 2 App. Cas. 792; Moore *v.* G. S. & W. R'y Co., L. R. 10 Ir. Com. Law, 65. Just how far the cases cited were controlled by the presence or absence of local statutes it is not necessary here to determine.

"It is well settled that a carrier of ordinary inanimate freight cannot by any agreement, however plain and explicit, wholly relieve

that it arose from its own fault rests upon him if he would excuse himself upon that ground. Whereas if he is to be considered merely as the paid agent of the owner for the transportation of his stock, his liability would rest solely upon the question of negligence, the burden of proving which would be upon the owner of the freight; and this has been the contention in many of the cases in which he has been held liable as a common carrier.

itself from all liability whatsoever resulting from its own negligence. Black *v.* Goodrich Transp. Co. 55 Wis. 319. Just the extent that a carrier of such inanimate freight may by express contract exempt itself from liability for its own negligence need not here be determined. Certainly, there is a broad distinction between the risk incident to the carriage of such ordinary inanimate freight and that of live animals having instincts, habits, propensities, wants, necessities and powers of locomotion. Requisite care in case of the transportation of such live stock, therefore, necessarily implies food and water periodically, and at times especial care and shelter outside of the vehicle of carriage. All these things would require help, appliances, conveniences and extra arrangements not requisite in the case of ordinary inanimate freight, which a carrier might be unable or unwilling to furnish; and yet, if furnished by the owner of such live stock, and the risk incident to them assumed by such owner, the carrier might be able and wiling to undertake such transportation. And yet, with all reasonable care, it would be impossible to secure at all times absolute safety in the transportation of such live animals.

"This broad distinction between that class of freightage and ordinary inanimate freight has frequently been observed by the courts. Blower *v.* G. W. R'y Co., L. R. 7 C. P. 655; Shir. Lead. Cas. No. 22, p. 50; Clarke *v.* R. & S. R'y Co., 14 N. Y. 570; Penn. *v.* B. & E. R'y Co., 49 N. Y. 204; Cragin *v.* N. Y. C. R. R. Co., 51 N. Y. 61; Holsapple *v.* R., W. & O. R. R. Co., 3 Am. & Eng. R'y Cas. 487; Smith *v.* N. H. & N. R. R. Co., 12 Allen, 531; Evans *v.* Fitchburg R. R. Co., 111 Mass. 142; Michigan S. & N. Ind. R. R. Co. *v.* McDonough, 21 Mich. 189; Lake Shore & M. S. R. R. Co. *v.* Perkins, 25 Mich. 329. There would certainly seem to be no good reason why a carrier might not by express contract exempt itself from damage caused wholly, or, perhaps, in part, by the instincts, habits, propensities, wants, necessities, vices or locomotion of such animals. *Ibid.* As to injury from such causes the common-law liability and obligation do not seem to attach; certainly not with the same rigidity as they do in ordinary inanimate freight. *Ibid.* Thus, in a late case in Minnesota it is held that 'a railroad corporation which

Sec. 342. Though injury caused by peculiar nature of the animals, carrier not excused if he has been negligent. —But while it is always competent for the carrier to show in his defense that the injury resulted from the peculiar nature or inherent vices of the animals themselves and thus excuse himself from liability, if it appear that he has been guilty of any negligence and that such negligence contributed to the injury, the excuse can no longer avail him.[1] It is his duty to exercise at all times ordinary care in guarding the stock against such injuries as are likely to result from their natural propensities and which, in view of the character of the animals, can reasonably be foreseen and provided against; and for a failure to do so whereby the animals cause themselves injury, he will be liable. Thus in the case of Loeser *v.* The Railway Company,[2] it appeared that the defendant's servants unloaded a number of horses from the car in which they were being transported and

undertakes to transport live stock for hire for such persons as choose to employ it assumes the relation of a common carrier with such modifications of the common-law liability of carriers as arise from the nature of the animals and their capacity for inflicting injury upon themselves and upon each other.' Moulton *v.* St. P., M. & M. R'y Co., 12 Am. & Eng. R'y Cas. 13. To these things may well be added other things incident to live stock."

1. Giblin *v.* Steamship Co., 8 Misc. Rep. 22, 28 N. Y. Supp. 69.

If, during transit, the carrier negligently exposes cattle to the cold weather prevailing at that season of the year and they are damaged, he will be liable. Rail road Co. *v.* Smissen, 31 Tex. Civ. App. 549, 73 S. W. Rep. 42.

That a horse becomes frightened, breaks its bridle and runs away, is not sufficient to charge the carrier with a failure to exercise proper care. Kaplan *v.* Railroad Co., 88 N. Y. Supp. 945.

Where a carrier negligently sent forward a dog by an earlier train than it should have done, and there being no one at destination to receive it, shipped it back again, and the owner on its return directed that it be reshipped, it was held by a divided court that the death of the dog through an overstrained bladder due to its long confinement had, as its proximate cause, the failure of the owner to properly attend it before its reshipment, and that the carrier was not liable for its loss. Harrison *v.* Weir, 75 N. Y. Supp. 909, 71 App. Div. 248, *s. c.* 73 N. Y. Supp. 1119, *reversing* 69 N. Y. Supp. 957, 34 Misc. Rep. 519.

2. 94 Wis. 571, 69 N. W. Rep. 372.

drove them in a group into a yard, where they were to be tied. Before all of the horses were tied, two of the number began to kick and one of them, by its own act of kicking, dislocated its leg at the hock, necessitating its being killed. The jury found that the manner of driving the horses loosely in a body instead of separately was, under the circumstances, a negligent act, and returned a verdict against the defendant. On appeal, judgment on the verdict was affirmed, the court saying that ordinary care might well have required in such a case that vigilance be used to guard against and restrain the natural propensities of the animals to cause themselves injury.

Sec. 343. Duty of shipper to disclose peculiarities affecting risk.—It is clearly the duty of the shipper to disclose, if requested, any peculiarities or infirmities in the animals, known to him and not to the carrier, which would increase the risk of carriage in the usual manner or require greater precautions for their safety than those usually requisite;[3] and so, without request, it would be the duty of the shipper to disclose such peculiarities or infirmities not known to the carrier and not discernible from the appearance or condition of the animal;[4] and the carrier would not be liable, in the absence of such a disclosure, where, having used the care and diligence usually requisite, an injury was sustained proximately owing to such peculiarity or infirmity.

But a failure so to disclose would not relieve the carrier for a loss proximately caused by his own negligence, nor could he complain of the failure to disclose a condition of things evident from the appearance of the animal itself.

VIII. EXCEPTIONS MADE BY STATUTE.

Sec. 344. (§ 224.) Statutes limiting carrier's liability.—Besides the exceptions which are allowed by the common law to the liability of the carrier for loss of the goods, or the injury which may have happened to them whilst in this custody, statutory enactments have been made, both in this country and in England, which have greatly modified as to certain classes of car-

3. See *ante*, § 329.

4. See *ante*, § 330.

riers the rigorous liability which was imposed upon them by the rules of the common law. The English Land Carriers' Act, which will be more particularly referred to in the chapter upon the subject of the limitation of the carrier's liability by contract, and which, as its title indicates, is confined to carriers by land, was designed to protect all such carriers from imposition, and from losses for which they could not fairly be held liable on account of the failure of their employer to disclose the value of packages intrusted to them, as well as to promote a system of fair dealing between the carrier and the public; and with respect to the owners of sea-going vessels as carriers, besides the exceptions always contained in their bills of lading, their common-law liability is greatly narrowed by acts of parliament protecting them against liability for losses by fire; from the obligation to make good losses of gold, silver, diamonds, watches, jewels or precious stones by robbery or embezzlement, unless the owner has at the time of the shipment declared the value thereof; from making good any losses incurred by the misconduct of the master and mariners without their privity, or by robbery, by whomsoever committed, to a greater extent than the value of the ship and freight; and to all other cases of loss occasioned without their default or privity.[5] And a similar law has been enacted by the congress of the United States, under its constitutional power to regulate commerce, for the protection of the owners of all vessels employed as common carriers.[6]

Sec. 345. Policy of United States courts towards carriers by water changed by Harter Act.—On February 13,

5. English notes to Coggs *v.* Bernard, 1 Smith's Ld. Cases, 368, 369.

6. The above laws of the congress of the United States for the protection and to limit the liability of the owners of vessels as common carriers are to be found in the Revised Statutes from sec. 4281 to 4289 inclusive, and are as follows:

Sec. 4281. If any shipper of platina, gold, gold dust, silver, bullion or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, or any gold or silver in a manufactured or an unmanufactured state, watches, clocks or time-pieces of any description, trinkets, orders, notes or securities for the payment of

1893, the Congress of the United States changed the entire policy of the federal courts towards carriers by water by the passage of what is known as the Harter Act. The text of the first three

money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace or any of them, contained in any parcel or package or trunk, shall lade the same as freight or baggage on any vessel, without at the time of such lading giving to the master, clerk, agent or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

See Wheeler *v.* Navigation Co., 125 N. Y. 155; Carlson *v.* Oceanic Steam Nav. Co., 109 N. Y. 362; Ocean Steamship Co. *v.* Way, 90 Ga. 751; Calderon *v.* Steamship Co., 170 U. S. 272, *reversing* 69 Fed. 574, 16 C. C. A. 332, 35 U. S. App. 587 and 64 Fed. 874; The St. Cuthbert, 97 Fed. 341; The Bermuda, 29 Fed. 399.

This section does not apply to a passenger's baggage. La Bourgoyne, —— C. C. A. ——, 144 Fed. 781.

Sec. 4282. No owner of any vessel shall be liable to answer for or make good to any person, any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

See Constable *v.* National Steamship Co., 154 U. S. 62, 14 Sup. Ct. R. 1062, 38 L. Ed. 903; Steamship Co. *v.* Hill Mfg. Co. 109 U. S. 587; *In re* Old Dominion Steamship Co., 115 Fed. 845; The City of Clarkville, 94 Fed. 201; The Strathdon, 89 Fed. 378; The Rapid Transit, 52 Fed. 320; Heye *v.* North German Lloyd, 33 Fed. 70; The Garden City, 26 Fed. 769; The Marine City, 6 Fed. 415; The San Rafael, 141 Fed. 270, —— C. C. A. ——, *modifying* 134 Fed. 749.

Sec. 4283. The liability of the owner of any vesel for any embezzlement, loss or destruction by any person of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending.

See O'Brien *v.* Miller, 168 U. S. 303; The Chattahoochee, 173 U. S.

554, *aff'g* 74 Fed. 899, 21 C. C. A. 162; The Main *v.* Williams, 152 U. S. 128; *In re* Morrison, 147 U. S. 34; Craig *v.* Continental Ins. Co., 141 U. S. 645; Butler *v.* Steamship Co., 130 U. S. 558; The Manitoba, 122 U. S. 111; The City of Norwich, 118 U. S. 503; The Scotland, 118 U. S. 518; The Mamie, 110 U. S. 742; Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 589; Lord *v.* Steamship Co., 102 U. S. 543; The Benefactor, 103 U. S. 243; The City of Hartford, 97 U. S. 323; The Virginia Ehrman, 97 U. S. 317; Norwich Co. *v.* Wright, 13 Wall. (U. S.) 121; The Tommy, 142 Fed. 1034; The Harry Hudson Smith, —— C. C. A. ——, 142 Fed. 724; *In re* Pacific Mail S. S. Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71; Weisshaar *v.* Kimball S. S. Co., 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A 84, *reversing*, *In re* Kimball S. S. Co., 123 Fed. 838; The Cygnet, 126 Fed. 742, 61 C. C. A. 348; Gleason *v.* Duffy, 116 Fed. 301; *In re* Old Dominion S. S. Co., 115 Fed. 849; Parsons *v.* Empire Transp. Co., 111 Fed. 208; The George W. Roby, 111 Fed. 601, 49 C. C. A. 481; The Eureka, 108 Fed. 672; The La Bourgoyne, 104 Fed. 823; The Longfellow, 104 Fed. 363; The Jane Grey, 99 Fed. 591, *s. c.* 95 Fed. 693; *In re* Piper Aden Goodall Co., 86 Fed. 670; The Colima, 82 Fed. 679; The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366, 44 U. S. App. 591; The H. F. Dimock, 77 Fed. 238; The Columbia, 73 Fed. 226, 44 U. S. App. 326, 19 C. C. A. 436; The Republic, 61 Fed. 109, 9 C. C. A. 386, *aff'g* 57 Fed. 240; Quinlan *v.* Pen, 56 Fed. 119; The Rosa, 53 Fed. 132; The Giles Loring, 48 Fed. 471; The Anna, 47 Fed. 526; The City of Para, 44 Fed. 691.

Sec. 4284. Whenever any such embezzlement, loss or destruction is suffered by several freighters or owners of goods, wares, merchandise or any property whatever, on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owner of the property and the owner of the vessel or any of them may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable, among the parties entitled thereto.

See O'Brien *v.* Miller, 168 U. S. 306; The City of Norwich, 118 U. S. 491; Butler *v.* Steamship Co., 130 U. S. 551; *Ex. p.* Slayton, 105 U. S. 452; The La Bourgoyne, 117 Fed. 264; The M. Moran, 107 Fed. 526; The Eureka No. 32, 108 Fed. 673; The S. A. McCaulley, 99 Fed. 203; The Catskill, 95 Fed. 702; *In re* Harris, 57 Fed. 245; The H. F. Dimock, 52 Fed. 600.

Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss or destruction of any property, goods or merchandise, if he shall transfer his interest in such vessel and freight for the benefit of such claimants to a trustee to be appointed by any court of com-

sections of that act is given in full in the notes.[7] Before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in the officers and crew, because such a contract was

petent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

See Ex. p. Phenix Ins. Co., 118 U. S. 617; Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 600; The Catskill, 95 Fed. 702; The H. F. Dimock, 77 Fed. 238; *In re* Meyer, 74 Fed. 881.

Sec. 4286. The charterer of any vessel, in case he shall man, victual and navigate such vessel at his own expense or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

See The Barnstable, 181 U. S. 468; Smith *v.* Booth, 122 Fed. 626, 58 C. C. A. 479.

Sec. 4287. Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers or seamen for or on account of any embezzlement, injury, loss or destruction of merchandise or property put on board any vessel, or on account of any negligence, fraud or other malversation of such master, officers or seamen respectively, nor to lessen or take away any responsibility to which any master or seamen of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

See Craig *v.* Continental Ins. Co., 141 U. S. 646.

Sec. 4288. Any person shipping oil of vitriol, unslaked lime, inflammable matches or gunpowder in a vessel taking cargo for divers persons on freight without delivering at the time of shipment a note in writing expressing the nature and character of such merchandise to the master, mate, officer or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of $1,000. But this section shall not apply to any vessel of any description whatsoever used in rivers or inland navigation.

Sec. 4289. The provisions of this title relating to the limitation of the liability of the owners of vessels shall not apply to the owners of any canal-boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.

See In re Garnett, 141 U. S. 12; The Columbia, 73 Fed. 227, 19 C. C. A. 436; The Anna, 47 Fed. 525; The Katie, 40 Fed. 480.

7. HARTER ACT.

"*An act relating to navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the car-*

held by the federal courts to be contrary to public policy, and, in this particular the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who could at that time contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American

riage of property.—(Act of Feb. 13, 1893, ch. 105, 27 Stat. L. 445.)"

"Sec. 1. That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

ship owner and Congress saw fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owner exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty.[8]

Sec. 346. Statute similar to Harter Act enacted in Great Britain in 1900.—In 1900 the Parliament of Great Britain passed an amendment to the Merchant Shipping Act of 1894,[9] by which it was enacted that "the limitation of the liability of the owners of any ship set by section 503 of the Merchant Shipping Act of 1894 in respect of loss of or damage to vessels, goods, merchandise, or other things shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship." The laws of Great Britain and the United States, therefore, are substantially similar at this time upon this subject.

Sec. 347. To what vessels and property Harter Act applies.—The Harter Act applies to all vessels transporting merchandise to and from any port of the United States, situated upon any navigable waters, inland or otherwise, over which the federal government has jurisdiction.[10] The third section

8. The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130.

The Harter Act was not retroactive in its provisions. The Energia, 66 Fed. 605, 13 C. C. A. 653, 35 U. S. App. 6; *aff'g* Insurance Co. *v.* The Energia, 61 Fed. 222 and Phillips *v.* The Energia, 56 Fed. 124. *See* also to the same effect: Humboldt, etc., Ass'n *v.* Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264.

9. 63 & 64 Vict., C. 32.

Charterers of a vessel for a short period are not its "owners" within the meaning of the above statute and are not entitled to a limitation of liability under its terms. The Steam Hopper, No. 66, 75 L. J. P. 22.

10. *In re* Piper Aden Goodall Co., 86 Fed. 670.

which provides that if the owner of any vessel transporting property "to or from any port of the United States shall exercise due diligence, etc.," applies to vessels engaged in commerce on the Great Lakes, notwithstanding that sections 1, 2 and 4 are expressly confined to shipping "between ports of the United States and foreign ports."[11] The act will also be applied to foreign vessels in suits brought in the United States, and when the vessel owner sets up the act, he must take the burdens with the benefits, and cannot claim a greater limitation of liability under the terms of a bill of lading.[12]

Damages for personal injuries received by a passenger or for loss of his personal baggage are not within the provisions of the Harter Act.[13]

Sec. 348. Harter Act only modifies relations between a vessel and her cargo.—The whole object of the act is to modify the relations previously existing between a vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair and outfit of the vessel, and the care and delivery of the cargo. The liability of a vessel to other vessels

11. The E. A. Shores, Jr., 73 Fed. 342.

12. The Germanic, 196 U. S. 589, 25 Sup. Ct. R. 317, *aff'g*, 124 Fed. 1, 59 C. C. A. 521 and 107 Fed. 294; Knott *v.* Botany Worsted Mills, 179 U. S. 69, 21 Sup. Ct. R. 30, 45 L. Ed. 90; *aff'g* Botany Worsted Mills *v.* Knott, 82 Fed. 471, 27 C. C. A. 326, 51 U. S. App. 467, and 76 Fed. 582; The Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801; *aff'g* 74 Fed. 899, 21 C. C. A. 162; The Silvia, 171 U. S. 462, 19 Sup. Ct. R. 7, 43 L. Ed. 241, *aff'g* 15 C. C. A. 262, 35 U. S. App. 395, 64 Fed. 607; The Frey, 92 Fed. 667, *reversed in* 106 Fed. 319, 45 C. C. A. 309 on another point.

The third section applies to the negligence of the pilot of a vessel in a foreign port. The Etona, 71 Fed. 895, 18 C. C. A. 380, 38 U. S. App. 50, *aff'g* Doherr *v* The Etona, 64 Fed. 880.

13. The Rosedale, 88 Fed. 324, *affirmed* 92 Fed. 1021, 35 C. C. A. 167; Moses *v.* Packet Co., 88 Fed. 329; *In re* California Nav. & Imp. Co., 110 Fed. 678; La Bourgoyne, —— C. C. A. ——, 144 Fed. 781.

with which it may come in contact was not intended to be affected,[14] nor was the relation between owners and charterers.[15]

Sec. 349. Stipulations in bills of lading contrary to section one of Harter Act are void.—Under the first two sections of the Harter Act, it is clear that the common-law liability of the ship owner regarding the necessity for due care being taken in respect of the cargo was carefully preserved, except so far as that liability may have been expressly cut down by the provisions of section three.[16] The courts have given full effect to the words of section one, and stipulations in bills of lading seeking to exempt shipowners from liability for loss or damage arising from negligence in loading, stowage, custody, care or proper delivery of the cargo have been held to be null and void.[17]

Sec. 350. Meaning of word "loading" in section one of Harter Act.—The word "loading" in section one is not synonymous with the word "stowage" in the same section. It refers to the proper use of the means used for the transference of the goods to the vessel. Thus if taking a cargo to a vessel in lighters be part of the loading of the vessel, a stipulation in a

14. The Delaware, 161 U. S. 459, 16 Sup. Ct. R. 516, 40 L. Ed. 771.

15. Lake Steam Shipping Co. *v.* Bacon, 129 Fed. 819.

16. Rowson *v.* Atlantic Transport Co. (1903) 2 K. B. 666, 72 L. J. K. B. 811, *aff'g* (1903) 1 K. B. 114.

17. Calderon *v.* Steamship Co., 170 U. S. 272, *reversing*, 69 Fed. 574, 16 C. C. A. 332, 35 U. S. App. 587 and 64 Fed. 874; The Manitoba, 104 Fed. 145. In The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 Sup. Ct. R. 1, *reversing* 108 Fed. 880, 48 C. C. A. 123, the following printed stipulation was held void: "It is expressly provided that the goods shipped hereunder are absolutely at the risk of the owners in every respect, and that the carrier is responsible for no loss, delay or damage thereto, however arising, including stowage, and all risks of breakdown and injury, however caused, whether to its refrigerator or machinery, even though arising from defect existing at or previous to the commencement of the voyage."

In Bethel *v.* Mellor & Rittenhouse Co., 131 Fed. 129, a notation on the bills of lading that the ship was "not responsible for broken or cut bales" could not protect the ship from responsibility for negligent loading and stowage.

bill of lading relieving the carrier from failure to provide a fit lighter is prohibited by section one.[18]

Sec. 351. "Stowage" used in two senses in section one of Harter Act.—The word "stowage" in the first section is used in two senses. It is used, first, with a view to the proper distribution and placement of the cargo, having in mind its inherent and natural characteristics, and, second, with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea. We will treat the latter aspect first.

Sec. 352. Stowage with a view to the proper trim of the vessel.—Stowage, with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea, calls for the exercise of the greatest skill and care on the part of the ship-owner.[19] Consequently a lack of care and skill, such as will render the carrier liable for damages resulting to the cargo, is shown when a ship, in other respects seaworthy, is so laden under the carrier's orders as to become top heavy at starting, with the result that part of her cargo is jettisoned in a gale which otherwise could have been weathered in safety.[20] So if a barge is so heavily laden that it shows signs of listing and unsteadiness while being towed, its owners will be liable for the loss of the cargo if it sinks at the dock.[21]

Sec. 353. Responsibility for such stowage rests upon the carrier alone.—Questions pertaining to the proper distribution of heavy and light cargo, or proper ballasting and stowage in order to make the ship sufficiently easy and safe are not questions that devolve upon the shipper to determine, nor is he in any way responsible for their solution. The responsibility

18. Insurance Co. of North America *v.* North German Lloyd Co., 106 Fed. 973; *aff'd* in Nord-Deutscher Lloyd *v.* President, etc., of Insurance Co., 110 Fed. 420, 49 C. C. A. 1.

19. Corsar *v.* Spreckels & Bros. Co., —— C. C. A. ——, 141 Fed. 260, *modifying* The Musselerag, 125 Fed. 786.

20. The Whitlieburn, 89 Fed. 526; Master and Owners of S. S. "City of Lincoln" *v.* Smith, L. R. (1904) App. Cas. 250.

21. The G. B. Boren, 132 Fed. 887.

is upon the carrier alone.[22] He alone must judge whether the vessel is being overloaded, and if, in his judgment the vessel is being overloaded, he should stop it. If the vessel cannot carry, without straining, the load put upon her, the vessel's owner will be liable for any damage resulting to the cargo.[23]

Sec. 354. Stowage with reference to the natural characteristics of the cargo carried—Effect of custom.—Improper stowage, used in the sense of the distribution and placement of the cargo with reference to its inherent and natural characteristics, will render a ship-owner liable under the Harter Act.[24] But in determining what is proper stowage the customs and usages of the place of shipment are to be considered, and, if these customs are followed, and if none of the known and usual precautions for safe stowage are omitted, no breach of duty or negligence can be imputed to the ship, and in case of damage under great stress of weather the injuries will be ascribed to perils of the seas.[25]

22. The Frey, 92 Fed. 667, *reversed* in 106 Fed. 319, 45 C. C. A. 309 on question of fact.

23. The William Power, 131 Fed. 136; The Giles Loring, 48 Fed. 463.

Provisions in a charter party that charterer's stevedores be employed by the master and paid by him does not affect the liability of the ship, or the owners, for improper stowage, since the stevedores in such case are held to be in the employ of the captain and under his direction and control as the representative of the owners. Bethel *v.* Mellor & Rittenhouse, 131 Fed. 129.

If a steamship company appoints a shipping agent who is wholly incompetent for that line of business, and the shipping agent loads cargoes on vessels which are not suited for that class of cargo, and the cargoes are consequently lost or damaged, the Harter Act will not relieve the steamship company from the consequences of its own gross negligence in the appointment of that agent. Parsons *v.* Transportation Co., 111 Fed. 202, 49 C. C. A. 302.

24. The Palmas, 108 Fed. 87, 47 C. C. A. 220.

In the Victoria, 114 Fed. 962, the carrier was held liable for the improper stowage of a piece of marble.

In Crooks *v.* The Fanny Skolfields, 65 Fed. 814, the ship was held liable for the damage due to placing heavy casks of oil on small casks of plumbago.

But in The Tjomo, 115 Fed. 919, the court held that proper skill had been exercised in stowing cattle.

25. The Tjomo, 115 Fed. 919; *see also* The Colima, 82 Fed. 665.

Sec. 355. Stowage of liquid cargo.—The stowage of liquid cargo requires especial care on account of its liability to leak and injure cargo under or near it. In this connection it has been held that it is not improper stowage to place it in the between-decks, over dry cargo in the hold, provided the decks are permanently laid, in thorough order, well caulked and tight, and provided with sufficient scuppers for the escape of leakage.[26] But to stow a liquid cargo in the same compartment with other cargo peculiarly susceptible to injury from liquids, when other compartments are available, is such negligence as will render the carrier liable.[27]

Sec. 356. Duty of ship to provide proper dunnage.—It is the duty of a ship to dunnage the cargo in a manner reasonably sufficient to protect it from what is naturally to be expected, and in accordance with the usages of the port of shipment. For failure to use such reasonable care and customary dunnage as would have protected the cargo, even in extraordinary weather if such weather ought to have been expected, the ship remains liable.[28] The ship must provide proper dunnage even though the goods are loaded by the charterers' stevedores. The stevedores cannot be supposed to have notice that, by the construction of the ship, dunnage is necessary unless dunnage is provided for their use.[29]

26. This has been held with regard to Ceylon cocoanut oil which, partly by reason of its inherent qualities and partly because of bad cooperage, always leaks greatly from the casks. The Dunbritton, 73 Fed. 352, 19 C. C. A. 449, 38 U. S. App. 369, *reversing* Crooks *v.* The Dunbritton, 61 Fed. 764.

The same holding has been made with reference to molasses. The Centurion, 68 Fed. 382, 15 C. C. A. 480, 35 U. S. App. 332, *reversing* Bregaro *v.* The Centurion, 57 Fed. 412. If the hatch is not absolutely tight, the vessel will be liable for damage to the cargo below. The Mississippi, 113 Fed. 985, *affirmed.* 120 Fed. 1020, 56 C. C. A. 525.

27. In The Orcadian, 116 Fed. 930, the vessel was held liable for the negligent stowage of barrels of cod oil in a compartment filled with wool, when another compartment was available, the wool, in consequence, having become saturated with the cod oil.

28. The Aspasia, 79 Fed. 91, *affirmed without opinion.* (C. C. A.) 80 Fed. 1003.

29. Robinson *v.* Franklin Sugar Refining Co., 70 Fed. 792.

Sec. 357. Stowage of delicate and easily tainted goods.—Goods which emit an odor and are liable to taint and spoil delicate cargo should not be placed in the same hold. Thus stowing skins which emit a pungent odor in the same hold with teas is at the risk of the ship, and even if the closing of the hold on account of storm, or anticipated storm, results in the damage, the ship can find no exoneration on the ground that it was a fault in the management of the vessel, because the negligent stowage is the proximate cause of the loss.[30] Along the same line is the fact that if the ship itself is tainted through the carriage of prior cargoes, it will be liable for the consequent damage resulting to a delicate cargo, such as meat.[31]

Sec. 358. Goods should be secured from possibility of shifting.—The goods having been placed in a proper compartment, they should be secured from possibility of shifting even in heavy weather, if heavy weather should reasonably be anticipated.[32] Where no extraordinary weather or seas such as might not have been reasonably anticipated at that time of year, or no such weather as naturally to cause a shifting and destruction of cargo in a well-loaded and well-ballasted ship is shown, the primary cause of loss due to a shifting of the cargo must be ascribed to the deficiencies in the ship's condition in that regard at the time of sailing.[33]

30. The Hudson, 122 Fed. 96.

31. This was held in a case outside the Harter Act, but is undoubtedly applicable here. In Bostwick *v.* Steamship Co. (1904) 1 K. B. 319, 73 L. J. K. B. 240, the ship was tainted with carbolic acid and unfit for carriage of a delicate cargo like meat, and the ship was held liable notwithstanding a very general exemption clause in the bill of lading. A judgment for the plaintiff was affirmed in Steamship Co. *v.* Bostwick, App. Cas. (1905), 93.

32. The Mississippi, 113 Fed. 985, *affirmed without opinion*, 120 Fed. 1020, 56 C. C. A. 525.

See also Steamship Co. *v.* Pilkington, 28 S. C. R. (Canada) 146, where glass was improperly stowed.

33. The Frey, 92 Fed. 667, *reversed* in 106 Fed. 319, 45 C. C. A. 309, on ground that the evidence showed the winds and waves were sufficiently violent as to constitute a peril of the sea. The text, however, is undoubtedly a good statement of the law when the state of facts therein described exists.

Sec. 359. Proper stowage at commencement of voyage may be made improper by change of vessel's trim during voyage.—Thus far we have considered questions relating to the proper trim of the vessel separately from questions relating to the proper distribution and placement of the cargo, having in mind its inherent and natural characteristics. But changes in the loading or unloading at different stages in the voyage may affect the trim of the ship, and in that case if cargo, properly stowed at the beginning of the voyage, is damaged through the changed trim of the ship, the ship is liable under section one of the Harter Act. Thus bales of wool were stowed on end, with proper dunnage, between decks near the bow of a vessel, and forward of a temporary wooden bulkhead, which was not tight. The vessel after touching at several points took on at Pernambuco two hundred tons of wet sugar (from which there is always drainage) which was stowed, with proper dunnage, between decks, aft of the wooden bulkhead. At that time the vessel was trimmed by the stern, and all drainage from the sugar, flowing aft, was carried off by the scuppers, which were sufficient for the purpose when the vessel was down by the stern, or on even keel in calm weather. There was no provision for carrying off the drainage in case it ran forward. She discharged the cargo at Para, and when she left that port she was two feet down by the head. She continued in this trim until she took on an additional cargo at Port of Spain, where the error in trim was corrected. It was agreed that there was no damage to the wool by sugar drainage until the vessel was trimmed by the head at Para, and that the wool was damaged by sugar drainage at Para or between Para and Port of Spain. The question for the court was whether this damage to the wool was "loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery" of cargo, within the first section of the Harter Act; or was "damage or loss resulting from faults or errors in navigation or in the management of said vessel," within the third section of that act. The District Judge held, and his words were approved by the

Circuit Court of Appeals and United States Supreme Court, that the negligence consisted in stowing the wool far forward, without taking care subsequently that no changes of loading should bring the ship down by the head; that the question, therefore, was solely one of negligence in the stowage and disposition of the cargo, and of damage consequent thereon, though brought about by the effect of these negligent changes in loading on the trim of the vessel, and that since this drainage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, that negligence in loading fell within the first section. The ship and owner were, therefore, liable for the damage and the third section was inapplicable.[34]

Sec. 360. Negligence in delivery of cargo within the first section of the Harter Act.—When the primary cause of a loss is negligence in delivery of the cargo, the loss comes within the first, and not the third, section of the Harter Act.[35] Care must be exercised by the owner to see that a vessel is unloaded evenly, and that it is not made top or side heavy. If, through an uneven unloading, the vessel lurches to one side and springs a leak or sinks, or if it capsizes and injures the cargo remaining on board, the vessel will be liable in damages.[36]

Sec. 361. Vessel is liable for failure to deliver at all through master's negligence in overlooking goods.—A ves-

34. Knott *v.* Botany Worsted Mills, 179 U. S. 69, 45 L. Ed. 90, *aff'g* Botany Worsted Mills *v.* Knott, 82 Fed. 471, 27 C. C. A. 326, 51 U. S. App. 467, and *Id.* 76 Fed. 582.

35. The Seaboard, 119 Fed. 375. In this case goods were lost by the sinking of a lighter to which the goods had been transferred before the lighter could reach the wharf.

36. The Germanic, 196 U. S. 589, *aff'g* 124 Fed. 1, 59 C. C. A. 521 and *Id.* 107 Fed. 294. In this case the vessel became top-heavy by the careless discharge of cargo and lurched violently to port until an open coal port was carried down below the water line sinking the ship and injuring all the merchandise on board.

See also to the same effect McAllister *v.* Railway, 111 Fed. 938, *aff'd* (C. C. A.) 113 Fed. 1019; Donaldson *v.* Perry Co. (C. C. A.) 138 Fed. 643.

sel is liable for negligence in so stowing goods that their delivery at their destination is overlooked, resulting in their subsequent loss. It is clearly the duty of the master of a vessel before leaving a port to examine the manifests or other memoranda of the vessel to ascertain whether the portion of the cargo consigned to that place has been delivered, and if not, to search for the missing consignment before leaving port. His failure to do this is obviously a breach of his general obligation to deliver his cargo to its consignees within the meaning of the first or second section of the Harter Act. Regard may doubtless be had to the custom of the port as to what shall be termed a proper delivery with respect to the time and manner of such delivery, but a failure to deliver at all is negligence. No such want of delivery can be excused under the terms either of the first or second sections of the Harter Act.[37]

Sec. 362. Second section of Harter Act is the complement of section three.—Before the passage of the act of Congress, known as the Harter Act, it was the settled law of the United States courts that, in the absence of special contract, there was a warranty upon the part of the shipowner that the ship was seaworthy at the beginning of her voyage. The warranty was absolute, and did not depend upon the knowledge of the owner or the diligence of his efforts to provide a seaworthy vessel.[38]

After its passage, this act became the rule of law for cases coming within its terms. In section two it is expressly provided that it shall be unlawful for any vessel transporting property or merchandise from or between ports of the United States and foreign ports to insert in any bills of lading or shipping

37. Calderon *v.* Atlas Steamship Co., 170 U. S. 272, *reversing, Id.* 69 Fed. 574, 16 C. C. A. 332, 35 U. S. App. 587, and *Id.* 64 Fed. 874.

38. The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 Sup. Ct. R. 1, *reversing, Id.*, 108 Fed. 880, 48 C. C. A. 123; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, *affirming* 43 Fed. 681 and 50 Fed. 567; The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823; The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. R. 831, 43 L. Ed. 130; *on certification from* Flint *v.* Chrystal, 83 Fed. 987, 31 C. C. A. 593, and *reversing* Chrystal *v.* Flint, 82 Fed. 472.

documents any covenant or agreement whereby the obligation of the owner to use due diligence to properly equip, man, provision and outfit said vessel, and to make the vessel seaworthy and capable of performing her intended voyage shall in anywise be lessened, weakened or avoided.[39] In this respect section two of the Harter Act is the complement of section three, which excuses the shipowner if he has exercised due diligence to make the vessel "in all respects seaworthy and properly manned, equipped and supplied." The two sections are to be read together, both being intended to enforce the same rule of diligence in respect to the same subject matter.[40]

Sec. 363. Effect of sections two and three on the warranty of seaworthiness.—The provisions of the second section deal, not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so doing by contract where the particular conditions exacted by the statute obtain. Because the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligations of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to using due diligence. To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used, cannot by any sound rule of construction be treated as implying that where due dili-

39. The Southwark, 191 U. S. 1, 48 L. Ed. 65, *reversing* 108 Fed. 880, 48 C. C. A. 123.

40. The Prussia, 93 Fed. 837, 35 C. C. A. 625 *aff'y*, *Id.*, 88 Fed. 531. In this case it was held that section two does not forbid exemption from liability in a bill of lading for a latent defect in the refrigerating apparatus. In The Southwark, 191 U. S. 1, 48 L. Ed. 65, *reversing*, 108 Fed. 880, 48 C. C. A. 123, the court said: "Section three must be read with section two to effectuate the purpose of the act, and shows an intention upon the part of Congress to relax in certain respects the harshness of the previous rules of obligation upon ship owners, provided the owner shall exercise due diligence to make the vessel seaworthy in all respects, in which event neither the vessel nor the owner shall be liable, among other things, for faults of management or for loss from inherent defect, quality or vice of the thing carried."

gence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist.[41] His use of due diligence has only the effect, so far as the second section is concerned, of reviving his right to limit by special contract his liability against unseaworthiness; and, without such special contract, the absolute warranty of seaworthiness remains even though due diligence has been used.[42]

The same kind of result has been reached with reference to section three. The exemption of the owners or charterers from loss resulting from "faults or errors in navigation or in the management of the vessel," and for certain other designated causes, in no way implies that because the owner is thus exempted when he has been duly diligent that thereby the law has relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a described character, when due diligence has been used, cannot be so extended as to cause the statute to say that the owner when he has been duly diligent is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein, but is also relieved, as respects every claim of every other description, from the duty of furnishing a seaworthy ship.[43] In

41. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181, *reversing Id.* 68 Fed. 254, 15 C. C. A. 385 and Wupperman *v.* The Carib Prince, 63 Fed. 266.

42. The Carib Prince, *supra;* The Silvia, 171 U. S. 462, 19 Sup. Ct. R. 7, 43 L. Ed. 241, *affirming* 64 Fed. 607, 35 U. S. App. 395, 15 C. C. A. 262; The Aggi, 107 Fed. 300, 46 C. C. A. 276, *affirming* 93 Fed. 484.

In McFadden *v.* Blue Star Line, (1905) 1 K. B. 697, the court said: "The effect of the incorporation of *s.* 2, which provides that it shall not be lawful to insert a clause in a bill of lading whereby the obligation of the owner to exercise due diligence shall be lessened, is as though the parties said, 'If we have in the exceptions inadvertently inserted a clause cutting down the obligation in respect of seaworthiness below an obligation to exercise care, that clause shall be null and void'; but it does not amount to a stipulation that the exercise of due diligence shall be sufficient. For that purpose an express stipulation is necessary, and there is none to be found in the section itself, and of course therefore none imported by its incorporation."

In The Tjomo, 115 Fed. 919, a special contract existed exempting the vessel from liability.

43. The Carib Prince, *supra.*

In McFadden *v.* Blue Star Line.

other words, if the unseaworthiness is not a result of error or fault in management or of one of the other causes designated in the third section, the third section does not apply; and even if it is the result of one of the designated causes, the exemption still cannot obtain, unless the owner used due diligence to make the vessel seaworthy.[44]

Sec. 364. Same subject—Latent defects.—In all cases, therefore, in which unseaworthiness is not a result of one of the causes designated in the third section, the warranty of seaworthiness remains absolute. This warranty does not depend on the shipowner's knowledge or ignorance, his care or negligence.[45] The shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she might be exposed in the course of the voyage; and this being so, that undertaking is not discharged because the want of fitness is the result of latent defects.[46]

supra, the court said: "And the incorporation of *s.* 3 does nothing more than give immunity in respect of loss resulting from certain specified causes in the course of the voyage, provided the shipowner has exercised due diligence to make the ship seaworthy. The reference to due diligence is a mere qualification upon that immunity; it is not a limitation of the obligation under the warranty."

44. International Navigation Co. *v* Farr & Bailey Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 Sup. Ct. R. 591, *affirming* Farr & Bailey Mfg. Co. *v.* International Navigation Co. 98 Fed. 636, 39 C. C. A. 197.

45. The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. R. 823.

46. In The Carib Prince, 170 U. S. 655, 18 Sup. Ct. R. 753, 42 L. Ed. 1181, *reversing Id.* 68 Fed. 254, 15 C. C. A. 385 and Wupperman *v.* The Carib Prince, 63 Fed. 266, the vessel was a new British steamship, built by builders of the highest class. The damage was due to a latent defect in a rivet, arising from the fact that the quality of the iron had been injured by too much hammering at the time it was annealed. After the construction the tank had been tested by hammer and by water pressure, and it was found to be tight, and strong enough to sustain the weight of water when not in motion, but when in motion the rivet proved insufficient and gave way. The Supreme Court of the United States held that the exemptions contained in the Harter Act were inapplicable, and the vessel was liable for damage to the cargo resulting from that latent defect.

See also The Caledonia, 157 U. S.

In all cases in which unseaworthiness *is* a result of one of the causes designated in the third section, the shipowner is relieved from the warranty of absolute seaworthiness to which he was bound prior to the Harter Act. The difference is important because in those cases it relieves the shipowner from responsibility for latent and undiscoverable defects, but the warranty of diligence remains.[47]

Sec. 365. Exemption clauses in bills of lading strictly construed.—Even though due diligence has been used, clauses of a bill of lading exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and are not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage. In other words, the court will not readily infer an exception of that warranty.[48]

124, 39 L. Ed. 644, 15 Sup. Ct. R. 537, *affirming* 43 Fed. 681 and 50 Fed. 567.

47. In The Irrawaddy, 171 U. S. 192, 43 L. Ed. 130, 18 Sup. Ct. R. 831; The Southwark, 191 U. S. 1, 48 L. Ed. 65; Nord-Deutscher Lloyd *v.* President, etc., of Insurance Co., 110 Fed. 420, 49 C. C. A. 1, and The Colima, 82 Fed. 665, there are general dicta to the effect that "the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence." As thus stated, those dicta are undoubtedly too broad, and all that the courts had in mind probably were those cases in which unseaworthiness *is* a result of one of the causes designated in the third section of the act.

48. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. R. 753, 42 L. Ed. 1181, *reversing*, *Id.* 68 Fed. 254, 15 C. C. A. 385, and Wupperman *v.* The Carib Prince, 63 Fed. 266; Borthwick *v.* Steamship Co. (1904) 1 K. B. 319, 73 L. J. K. B. 240; Rathbone Bros. & Co. *v.* McIver (1903) 2 K. B. 378, 72 L. J. K. B. 703, 19 Times L. R. 590, *reversing*, (1902) 8 Com. Cas. 1.

The provision in a bill of lading that the ship is not to be answerable for loss through any "latent defect in the machinery or hull not resulting from want of due diligence by the owners "does not cover a condition of unseaworthiness existing at the commencement of the voyage, but applies only to a state of unseaworthiness arising during the voyage. The Aggi, 107 Fed. 300, 46 C. C. A. 276, *affirming*, 93 Fed. 484. In The Maori King *v.* Hughes, (1895) 2 Q. B. 550, 65 L. J. Q. B. 168, *affirming* 64 L. J. Q. B. 744, a similar exception was under con-

Sec. 366. The test of seaworthiness.—The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. Seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but also upon its character in reference to the particular cargo to be transported. A vessel must be able to transport the cargo which it is held out as fit to carry or it is not seaworthy in that respect. A vessel, for instance, without special appliances, would be unseaworthy as to a perishable cargo of dressed beef, to be shipped on a long voyage in hot weather.[49]

Sec. 367. Burden of proof on carrier to prove vessel was seaworthy or due diligence was used to make her seaworthy.—Even if a loss occurs through the fault or error in management of a vessel, the exemption given by the Harter Act cannot be availed of unless the vessel is seaworthy when she sails or due

sideration and the court came to the same conclusion. See also The Sandfield, 92 Fed. 663, 34 C. C. A. 612, *affirming* 79 Fed. 371.

49. The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 Sup. Ct. R. 1, *reversing* 108 Fed. 880, 48 C. C. A. 123; American Sugar Refining Co. *v.* Rickinson Sons & Co., 124 Fed. 188, 59 C. C. A. 604, *reversing* 120 Fed. 591; Neilson *v.* Coal, etc., Co., 122 Fed. 617, 60 C. C. A. 175, *affirming* The Nellie Floyd, 116 Fed. 80; The Thames, 61 Fed. 1014, 10 C. C. A. 232, 8 U. S. App. 580; Rowson *v.* Atlantic Transport Co., (1903) 2 K. B. 666, 72 L. J. K. B. 811, *affirming* (1903) 1 K. B. 114; The Maori King *v.* Hughes (1895) 2 Q. B. 550, 65 L. J. Q. B. 168, *affi'g*, 64 L. J. Q. B. 744; Dene Shipping Co. *v.* Tucedie Trading Co., —— C. C. A. ——, 143 Fed. 854, *affirming* 133 Fed. 589.

Seaworthiness has been defined as "that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board." The Artic Bird, 109 Fed. 167.

A vessel, under the Harter Act, must be reasonably fit to carry her cargo, having in view the time of the year and the weather to be fairly expected during the voyage. The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421, *affirming* 117 Fed. 279.

The warranty of seaworthiness does not imply a warranty of insurability at the usual rates, and the refusal of insurance, while it may be considered as evidence of unseaworthiness, more or less convincing according to the circumstances of the case, is never conclusive evidence thereof, but is a fact to be considered in connection with the actual condition of the vessel. Moore & Co. *v.* Cornwall, —— C. C. A. ——, 144 Fed. 22, *affirming* 132 Fed. 868.

diligence to make her so has been exercised, and it is for the owner to establish the existence of one or the other of these conditions.[1] But the casting of the burden of proof on a shipowner does not destroy the presumptions in his favor which exist under the general law of evidence. Thus, although the burden of proving seaworthiness rests upon one who wishes to avail himself of the exemption of the third section of the act there is a presumption that the owner of a vessel performed his duty in making her seaworthy, and properly manning, equipping and supplying her for the voyage she was about to make, and this presumption of fact, where not controverted, sustains that burden, or, in case of controversy, may help to sustain it.[2] The question, therefore, whether a ship is reasonably fit to carry her cargo, or due diligence has been exercised to make her so, must depend on the particular facts of each case and must be determined upon the whole circumstances and the whole evidence.[3]

Sec. 368. How far warranty of seaworthiness extends—Vessel must be seaworthy at each stage of voyage.—The implied warranty of seaworthiness extends to the time when the vessel actually breaks ground for the voyage, and not merely to the time when she begins to take in cargo. Hence there is a

1. The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 Sup. Ct. R. 1, *reversing* 108 Fed. 880, 48 C. C. A. 123 and 104 Fed. 103; International Navigation Co. *v.* Farr & Bailey Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, *affirming* Farr & Bailey Mfg. Co. *v.* International Navigation Co., 98 Fed. 636, 39 C. C. A. 197.

The burden is on a shipowner to show seaworthiness. The Southwark, *supra;* The Oneida, 128 Fed. 687, 63 C. C. A. 239, *reversing* 108 Fed. 886; The Manitoba, 104 Fed. 145; The Gordon Campbell, 141 Fed. 435.

The burden of proof is on a shipowner to show due diligence in making the ship seaworthy. The Friesland, 104 Fed. 99; The Colima, 82 Fed. 665, 679; The Presque Isle, 140 Fed. 202.

2. The Wildcroft, 130 Fed. 521, 65 C. C. A. 145, *affi'g*, 126 Fed. 229 and 124 Fed. 631. See also The Giles Loring, 48 Fed. 463.

The finding that a vessel is unseaworthy ought not to be based on doubtful inferences. Memphis & C. Packet Co. *v.* Overman Carriage Co., 93 Fed. 246.

3. International Navigation Co. *v.* Farr & Bailey Mfg. Co. 181 U. S. 218, 45 L. Ed. 830, 21 Sup. Ct. 591, *affirming* Farr & Bailey Mfg. Co. *v.* International Navigation Co., 98 Fed. 636, 39 C. C. A. 197.

breach of the warranty where the vessel is pierced by an unknown obstruction while receiving cargo at a dock and the owners of the vessel are solely liable for a resulting injury to part of the cargo.[4]

When a voyage consists of several stages, the vessel must be made seaworthy at the commencement of each stage of the voyage she then enters upon.[5]

Sec. 369. Vessel liable for initial instability.—Where damage can be traced directly to the initial instability of a ship, the shipowner is not relieved from the consequences of that fault by the Harter Act.[6] Nor can he, in such case, be relieved by pleading the usages of the time and port. However material usages may be in questions relating to the equipment of the ship, the carrying of a deck load, or of different kinds of cargo on the same voyage, the amount and arrangement of dunnage, the proximity of different kinds of goods to each other, and the mode of stowing and securing them, usages can have little application to questions affecting the stability of the ship. For no custom can validate navigation by unstable ships, nor can custom determine whether a given vessel with a given loading is

4. Bowring *v.* Thebaud, 56 Fed. 520, 5 C. C. A. 640, 11 U. S. App. 648, *affirming* 42 Fed. 795.

In McFadden *v.* Blue Star Line (1905) 1 K. B. 697, Channel, J., came to the following conclusion: "The ordinary warranty of seaworthiness, then, does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed; it takes effect at the time of sailing, and at the time of sailing alone."

5. McFadden *v.* Blue Star Line, (1905) 1 K. B. 697; The Vortigem, (1899) Prob. 140, 68 L. J. Prob. 49, 80 Law T. (N. S.) 382, 47 W'kly Rep. 437; Thin *v.* Richards & Co., (1892) 2 Q. B. 141, 62 L. J. Q. B. 39.

6. In The Oneida, 128 Fed. 687, 63 C. C. A. 239, *reversing* 108 Fed. 886, faulty loading produced a list, and in order to readjust the cargo it became necessary to open a cargo port in the lower between decks. Opening the port, followed by the sudden lurch of the ship, caused the damage to the cargo, for which the ship was held liable. In the opinion of the court a ship cannot be said to be seaworthy which has at the inception of the voyage little, if any, positive metacentric height, a list of eight or nine degrees, and which has her cargo so distributed that her instability must increase as she proceeds.

stable or not. Ships vary greatly in model, and the requirements of loading in order to insure stability vary accordingly. These requirements are matters of positive knowledge, which no usage can affect or vary. Each ship presents its own problems. Custom has little, if any, scope for application. And as the limits of stable loading are determinable by rule for any given ship, no usage or practice can justify a departure from it.[7]

Inferences as to the instability of a ship, however, may be drawn from the circumstances surrounding an injury to it. Thus if a vessel is not able to withstand the swells of passing vessels, the inference is that she is in need of repairs and is not seaworthy.[8] So also there is a presumption of unseaworthiness when a vessel capsizes and sinks in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe,[9] or if a steamship, in an ordinary storm, when not disabled, can neither keep out of the trough of the sea, nor ride safely over it.[10] But if other facts material to the inquiry as to the seaworthiness of the vessel are proved, those facts must also be considered; and they must be weighed against such presumptive evidence, and unless the balance of the evidence warrants the conclusion that the vessel was unseaworthy when she sailed, such unseaworthiness cannot be properly treated as established.[11]

Sec. 370. Presumption of unseaworthiness when leaks soon happen in ordinary weather.—Leaks soon happening in ordi-

7. The Colima, 82 Fed. 665.

8. Forbes *v.* Express & Transportation Co., 111 Fed. 796.

9. Ajum Goolam Hossen & Co. *v.* Insurance Co., L. R. (1900) App. Cas. 362.

10. The Colima, 82 Fed. 665. Steamers ought not to capsize, except under most extraordinary circumstances. As respects stability, they have naturally a double advantage over sail vessels, in the great weight of their engines and boilers below, and in the absence of heavy sails and spars aloft. They should be stable enough to lie safely, in ordinary storms, in the trough of the sea, because they are liable at any time to be forced into that situation, and often are forced into it for considerable periods by the accidental disabling of their machinery.

11. Ajum Goolam Hossen & Co. *v.* Insurance Co., L. R. (1900) App. Cas. 362.

nary weather, and without other adequate causes of injury, are presumptive evidence of unseaworthiness at the time of sailing. The law will intend the want of seaworthiness because no visible or rational cause other than a latent or inherent defect in the vessel can be assigned for the result.[12] But where it satisfactorily appears that the vessel incurred marine perils which might well disable a staunch and well-manned ship, no such presumption can be invoked.[13] And where for a considerable time she has incurred such perils, and shown herself staunch and strong, any such presumption is not only overthrown, but the fact of her previous seaworthiness is persuasively indicated.[14]

Sec. 371. Leaking decks or hatches.—There is no presumption that a vessel was unseaworthy merely because the decks or hatches began to leak after she had encountered a continuous gale or hurricane.[15] But it is manifest that a vessel commencing her voyage with hatches so improperly or negligently covered, or with decks so improperly caulked, that water in large quantities can find its way through them, is not seaworthy especially when the voyage is undertaken at a season of the year when it is to be anticipated that the vessel will encounter heavy seas and that her decks will be constantly flooded.[16]

Sec. 372. Defective rivets or bolts.—Unseaworthiness may consist of defects in rivets or bolts on tanks or boilers or on parts of the vessel adjoining the cargo.[17] Thus water entered

12. The Warren Adams, 74 Fed. 413, 20 C. C. A. 486, 38 U. S. App. 356, *s. c.* 163 U. S. 679; The Sintram, 64 Fed. 884; The Artic Bird, 109 Fed. 167; The Nellie R. Bohannon, 64 Fed. 883.

13. The Warren Adams, *supra;* The Simtram, *supra.*

14. The Warren Adams, *supra.*

15. The Marechal Suchet, 112 Fed. 440; The Marlborough, 47 Fed. 667; The Hyades, 124 Fed. 58, 59 C. C. A. 424, *affirming* 118 Fed. 85.

16. The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421, *affirming* 117 Fed. 279.

A cargo of cement is peculiarly susceptible to injury from water, and if the deck is not properly caulked, the vessel is unseaworthy as to such cargo. Neilson *v.* Coal, etc., Co., 122 Fed. 617, 60 C. C. A. 175, *affirming* The Nellie Floyd, 116 Fed. 80.

17. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. R. 753, 42 L. Ed. 1181, *reversing Id.* 68 Fed. 254, 15 C. C. A. 385 and Wupperman *v.* The Carib Prince, 63 Fed. 266.

around the bolts fastening the scroll work of the figurehead on the bow of a vessel, and injured sugar stored in the main peak. Five or six bolts were sufficiently loose to admit the water to the main deck, from which it flowed through small holes to the main peak. The vessel was held liable for the damage to the sugar.[18]

But the fact that one rivet among thousands in the hull of a vessel parted under the stress of heavy weather, is insufficient to raise a presumption of unseaworthiness at the inception of the voyage.[19]

Sec. 373. Unfastened ports.—Whether an unfastened port on sailing renders a vessel unseaworthy or not, evidently depends on the situation of the port, its relation to the cargo or passengers, and the means provided for closing it on the voyage when necessary. If its situation is such that it is safe in moderate weather and all the requisite means and conditions are provided for closing it on the voyage when necessary, the vessel is not unseaworthy; and if, when closing becomes necessary on the voyage, those means are not made use of, the case is one of neglect or error in management within the meaning of section three of the Harter Act.[20] But knowledge that a cargo port is open, is one of the indispensable requisites and conditions for securing the closing of it when necessary on the voyage. Without that information all other provisions are useless; so that where no further inspection is expected or ordinarily required

18. The Aggi, 107 Fed. 300, 46 C. C. A. 276, *affirming* 93 Fed. 484.

19. The Sandfield, 92 Fed. 663, 34 C. C. A. 612, *affirming* 79 Fed. 371.

In Grubman *v.* The Ontario, 115 Fed. 769, 53 C. C. A. 199, *affirming* The Ontario, 106 Fed. 324, damage was caused by the giving way of two rivets about 8 inches apart on the top of a ballast tank upon which, properly dunnaged, wool was stowed. The evidence showed that the usual and ordinary tests had been applied before sailing. The court held that the breaking of the rivets occurred through the heavy weather encountered, and not because the ship was unseaworthy.

20. The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241, *affirming* 64 Fed. 607, 35 U. S. App. 395; The Manitoba, 104 Fed. 145; see also Steel *v.* Steamship Co., 3 App. Cas. 72.

to be made, and no knowledge that the port is open can be expected to be acquired by the officers on the voyage, a port supposed to be closed but in fact open and blocked by cargo and not likely to be discovered to be open, must be considered unseaworthiness on sailing, in so far as it is likely to imperil ship and cargo, though no farther.[21] In the case of ports situated only two or three feet above the water line[22] or of ports situated so low in the vessel as to be submerged when the vessel is fully loaded, such a rule is especially applicable, and the owners of the vessel will not be heard to say it was a fault in the "management" of the vessel.[23] The same rule obtains where no test is made of a port before sailing, and damage is caused by a badly fitting blind and glass door through which streams of water spurt at every roll of the ship.[24]

Sec. 374. Water and steam pipes, etc.—The water or steam pipes in a vessel should be carefully inspected and placed in a serviceable condition before sailing. Existing leaks should be stopped[25] and the pipes should be suitably protected against frost.[26] Suitable casing should be provided[27] and valves in

21. The Manitoba, 104 Fed. 145; Dobell & Co. *v.* Steamship Co., 64 L. J. Q. B. 777, (1895) 2 Q. B. 408. In this latter case the cargo was injured by sea water coming into the vessel during the voyage through a port hole which the ship's carpenter, whose duty it was to do so, had omitted properly to close before the vessel started upon her voyage. The port hole in question was used for shipping cargo, and was intended to be closed when the loading was completed and before the vessel started. Once the ship had started on her voyage the port hole could not be promptly closed nor without shifting a considerable portion of the cargo. It was held that the damage to the cargo resulted from the unseaworthiness of the ship at starting, and not from faults or errors in navigation.

22. International Navigation Co. *v.* Farr & Bailey Mfg. Co., 181 U. S. 218, 45 L. Ed. 830, 21 Sup. Ct. R. 591, *affirming* Farr & Bailey Mfg. Co. *v.* International Navigation Co., 98 Fed. 636, 39 C. C. A. 197.

23. The Tennedos, 137 Fed. 443.

24. The Phoenicia, 90 Fed. 116, *affirmed* on opinion of lower court, *Id.* 99 Fed. 1005, 40 C. C. A. 221.

25. Northwestern Transp. Co. *v.* Leiter, 107 Fed. 953, 47 C. C. A. 97.

26. There is a lack of suitable care in loading cargo into a compartment which contains a water-service pipe, not suitably protected against frost and without inspection as to its condition which

pipes through which water or steam might find its way into cargo compartments should be closed.[28] Unless those things are done the vessel is unseaworthy as to cargo which may be injured by the escape of water or steam from the pipes.

Unseaworthiness, however, cannot be predicated of accidental and temporary obstructions in pipes which could not fail to be removed by application of the tests prescribed by the shipowner's instructions,[29] unless, indeed, the shipowner has failed to use due diligence at the beginning of the voyage in equipping the ship with appliances at the end of the pipes to prevent the entrance of foreign substances which might foul the pipes.[30] Nor are the owners of a vessel called upon to test a manhole joint by a much greater pressure than is produced by the normal conditions of navigation.[31]

Sec. 375. Bulkheads.—Bulkheads are often used for other purposes than to make water-tight divisions of the hold, and hence in such cases are not expected to be water-tight; and even when they are designed to be tight, for the greater safety of the ship or the better preservation of the cargo, mere imperfection in carrying out this design cannot be said to constitute unsea-

could have been readily discovered and easily remedied. The Catania, 107 Fed. 152.

In McFadden *v.* Blue Star Line, (1905) 1 K. B. 697, the vessel was held liable for defective packing of a valve-chest.

27. The Glenmavis, 69 Fed. 472; Gilroy *v.* Price, (1893) App. Cas. 56.

28. The Manitou, 127 Fed. 554, 63 C. C. A. 109, *affirming* 116 Fed. 60.

29. Steinwender *v.* The Mexican Prince, 82 Fed. 484; *affirmed* on opinion of trial court in The Mexican Prince, 91 Fed. 1003, 34 C. C. A. 168.

30. A ship cannot exempt herself by bill of lading from liability for damage to cargo from sea water, as a peril of the seas, where such water entered because of the obstruction of a valve in a pipe leading to a tank used for the stowage of cargo, when the obstruction of the valve was due to the failure to use due diligence in equipping the ship at the beginning of the voyage with a rose or screen on the lower end of the pipe to prevent the entrance of foreign substances which might foul the pipe and thus allow the water to enter the tank and injure the cargo there stored. The Brilliant, 138 Fed. 743.

31. American Sugar Refining Co *v.* Rickinson Sons & Co., 124 Fed. 188, 59 C. C. A. 604, *reversing* 120 Fed. 591.

worthiness, when the absence of bulkheads altogether has no such effect. If there has been any express or implied warranty or representation that a vessel's bulkheads are water-tight, any damage resulting from leaking, must in that case be sought upon the ground of a breach of warranty or for the false representation, and not for unseaworthiness; and the pleadings must aver, and the evidence sustain, such a case.[32]

Where cargo is stowed against a water tank, or against a bulkhead serving as one side of a tank, if the tank or bulkhead is not tight, the vessel, though seaworthy as respects navigation, may be unseaworthy as respects cargo, since the direct natural consequences of the leak in that case is to damage the cargo, and the ship, therefore, is not in a reasonably fit condition for its transportation.[33] But that is a wholly different case from a mere leak between adjoining cargo compartments. In the latter case, if the ingress of water in the first compartment is due to sea-perils, or to negligence in the "management" of the ship, the extension of the damage to an adjoining compartment by a leak in the bulkhead is of the same nature, unless some representation or warranty can be invoked as a separate ground of liability.[34]

Sec. 376. Insufficiency of coal.—A vessel may be unseaworthy through an insufficiency of coal to complete the voyage.[35] If a vessel was unseaworthy on that account at the beginning of the voyage, an exception in the bill of lading covering negligence of the engineer in not informing the master that the coal

32. The British King, 89 Fed. 872, *affirmed* on opinion of trial court, 92 Fed. 1018, 35 C. C. A. 159.

33. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. R. 753, 42 L. Ed. 1181, *reversing Id.* 68 Fed. 254, 15 C. C. A. 385 and Wupperman *v.* The Carib Prince, 63 Fed. 266.

In The Palmas, 108 Fed. 87, 47 C. C. A. 220, the chain locker of a steamship which extended from the bottom to the main deck was not water-tight, and sugar stored next to the locker was damaged by sea water entering through the chain pipes. The ship was held liable in damages.

34. The British King, *supra.*

35. The Vortigem, (1899) Prob. 140, 68 L. J. P. 49, 80 Law T. (N. S.) 382, 47 W'kly Rep. 437; The Abazzia, 127 Fed. 495.

supply was short will not protect the shipowner from liability for damage to the cargo resulting from such unseaworthiness.[36]

Sec. 377. Defective fog horns.—So a failure to have a mechanical fog horn in good condition for use at the beginning of a voyage shows a want of due diligence in equipping the vessel. The shipowner cannot be exempted from liability in such case by claiming that it was a fault in the "management" of the vessel.[37]

Sec. 378. Deviations in compass.—But a slight deviation of a fraction of a point in a compass cannot be regarded as ground to condemn a vessel as unseaworthy, especially in the absence of any showing of its continuance for a sufficient time to raise a presumption of notice.[38]

Sec. 379. Vessel should be cleaned and repaired often and well.—In general it may be said that a vessel should be often examined and thoroughly inspected so as to be sure of its condition. It should not be used after it has become, from age, or decay, or injury, unfit for use, and should be repaired often and well, so long as, by repairing, it can be used safely, and no longer.[39] If a vessel's bottom is unusually foul and is so covered with grass and slime below her load line that her progress is materially retarded, the existence of that condition for a long time prior to and during a voyage will constitute unseaworthiness as to the cargo carried.[40] So if plates in the hold of a vessel are worn out, and their condition could easily be ascertained if the owner uses due diligence in examination, until that defect is repaired the vessel is unseaworthy as to cargo.[41] And in a case where a cargo was injured by sea water which entered the vessel through a hole which had been eaten by corrosion through the iron bottom of a valve chest three-eighths of an inch thick, and it did not appear that the valve chest had ever been taken out for examination during the nine years previous to the damage,

36. The Vortigem, *supra*.

37. The Niagara, 84 Fed. 902, 28 C. C. A. 528, 55 U. S. App. 445, *affirming* 77 Fed. 329.

38. The E. A. Shores, Jr., 73 Fed. 342.

39. The Northern Belle *v.* Robson, 154 U. S. 571, 14 Sup. Ct. R. 1166, 19 L. Ed. 748.

40. The Abbazia, 127 Fed. 495.

41. The Flamborough, 69 Fed. 470.

the ship was held liable for the damage to the cargo.[42] But if a vessel has been adequately repaired prior to the commencement of the voyage and her classification has been kept up on repeated surveys, the presumption of seaworthiness thus arising will not be overcome by evidence to the effect that the parts repaired were found in a worse condition than before, after the vessel had met with unusually heavy weather.[43]

Sec. 380. What is due diligence—Vessel owner responsible for acts of his agents.—The third section of the Harter Act provides that if the owner "shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting" from certain specified causes. It should be remembered that the diligence required is diligence to make the ship *in all respects* seaworthy.[44] That means diligence to equip and supply the vessel with all the requisites, and to do all the things mentioned in the preceding sections. It must be diligence adequate to the occasion, requiring such watchful caution and foresight as the circumstances of the particular service demand. It must be due diligence in the work itself, and not merely in the selection of the agents to do the work; otherwise, shipowners might escape all responsibility merely by selecting agents of good reputation, and would be relieved whether such agents exercised due care or not to make their vessel seaworthy, and any responsibility would be frittered away. The clear intent of the act is to require due diligence, not merely in the personal acts of the owner, but also on the part of the agents he may employ, or to whom he may have committed the work of fitting the vessel for sea.[45]

42. The Friesland, 104 Fed. 99.

43. The Guadeloupe, 92 Fed. 670.

44. International Navigation Co. *v.* Farr & Bailey Mfg. Co. 181 U. S. 218, 45 L. Ed. 830, 21 Sup. Ct. R. 591, *affirming* Farr & Bailey Mfg. Co. *v.* International Navigation Co., 98 Fed. 636, 39 C. C. A. 197.

45. International Navigation Co. *v* Farr & Bailey Mfg. Co., *supra*: Dobell & Co. *v.* Steamship Co., (1895) 2 Q. B. 408, 64 L. J. Q. B. 777; Nord-Deutscher Lloyd *v.*

Proof of inspection only of a general character is insufficient, and a shipowner cannot escape liability, where proof of general inspection only is made, by claiming that a defect in the vessel arose from the inherent qualities of the cargoes carried.[46] In a few cases some weight has been given to the possession of sur-

President, etc., of Insurance Co., 110 Fed. 420, 49 C. C. A. 1, *affirming* Insurance Co. *v.* North German Lloyd Co., 106 Fed. 973; The Colima, 82 Fed. 665; The Flamborough, 69 Fed. 470.

Due diligence is not used in making a vessel seaworthy when seams start from rocking of the vessel due to the swells from a passing steamer. Nord-Deutscher Lloyd *v.* President, etc., of Insurance Co., *supra.*

Due diligence "to make the ship in all respects seaworthy" includes diligence to secure the fitness of all cargo compartments, and every other element of initial seaworthiness. The Manitoba, 104 Fed. 145.

In The Mary L. Peters, 68 Fed. 919, affirmed on opinion of trial court in 79 Fed. 998, 25 C. C. A. 681, 26 U. S. App. 784, due diligence was held not to have been used in repairing leaks in waterways, hatches and decks.

46. In The Alvena, 79 Fed. 974, 25 C. C. A. 261, *affirming* 74 Fed. 252, a cargo of sugar was damaged by water coming through the bottom of the ship. The hole was caused by the corrosive action of the sugar drainage upon the iron plate of the steamer. This corrosive action being well known, iron steamers intending to carry sugar cargoes ought to have, as the Alvena had, a layer of Portland cement covering the entire bottom where the sugar is expected to be stored, which layer of cement should be kept solid and free from cracks. The accepted explanation was that through some crack in the cement the sugar drainage had worked down so as to corrode the plate beneath. The bill of lading stipulated against any liability, loss or unseaworthiness of the ship provided all reasonable means had been taken to make her seaworthy. The acid had eaten out a small hole. It was contended on the part of the ship that the cement had been broken by some blow on the outside. The court said that rested on conjecture only, without such evidence of actual facts as was necessary to sustain it, and that that did not dispense with proof of such inspection of the ship before commencement of the voyage as the nature of the case admitted and required. Proof of inspection was only of a general character and the accident arose from a lack of repair at the time the crack occurred or of the requisite inspection afterwards. "For such fault the Harter Act, even upon the broadest construction of it, affords no exemption of liability," the court said, "even though the corrosive action of sugar drainage was one of its inherent qualities. The ship was bound to the exercise of due diligence before the commencement of the voyage to prevent the access of drainage to the iron plates." The decree of the

veyors' certificates by a vessel.[47] But the better opinion seems to be that the possession of surveyors' certificates is not of great importance. The diligence required of vessels to enable them to claim the benefit of the Harter Act with reference to due diligence, is diligence with respect to the vessel, not in obtaining certificates.[48]

Sec. 381. Due diligence in manning vessel.—In order to avail himself of the exceptions contained in the third section of the Harter Act, a shipowner must use due diligence, not only to provide a seaworthy vessel, but he must also provide the vessel with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route; not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen such, for example, as the striking of the ship on a reef of rocks—and the consequent imperative necessity for instant action to save the lives of passengers and crew. Thus a vessel cannot be said to be properly manned when the crew is composed mostly of Chinese to whom orders can only be given through the Chinese boatswain and who do not understand orders given them by other officers.[49] And if the owners of the ship know of a custom of the crew that on the voyage, or at ports intermediate or otherwise, or on the seas, the fires will be banked, the water for steam allowed to get cold, that the captain and engineer will go ashore and the rest of the crew will go to sleep, that there is no method of being forewarned of leaks and that all equipment for avoiding injury therefrom will be rendered useless, and if the owners approve, suffer, or connive at such custom or practice, such vessel is not properly manned, nor do the owners intend that the initial equipment and crew shall perform the duties for which they are provided. If the Harter Act was expected to absolve

district judge holding the ship liable was affirmed by the Circuit Court of Appeals.

47. The Jane Grey, 99 Fed. 582, *s. c.* 95 Fed. 693; The Guadeloupe, 92 Fed. 670.

48. The Abbazia, 127 Fed. 495.

49. *In re* Pacific Mail S. S. Co., 130 Fed. 76, 69 L. R. A. 71, 64 C. C. A. 410, *reversing* 126 Fed. 1020. See also The Fri, 140 Fed. 123.

owners under such conditions it goes beyond its present understood purpose, and allows them to make provision for negligent acts and omissions, and for undoing on the voyage what they have done before the voyage began.[50]

Gross negligence on the part of the master will raise a strong presumption of fact that the master was not competent and will throw the burden on the shipowners to establish the proposition that they used due diligence with reference to his selection, whether the statute does or does not impose such a burden. Nor do the owners prove "due diligence" by simply showing that they had no knowledge or reason to believe that the master was not competent. "Due diligence" implies more than that.[51] Especially would this be true where the master was of such intemperate habits, and so addicted to intoxication as to render him unfit for his position.[52]

There is no presumption that a vessel was not properly manned from the absence of a lookout. Whether a lookout is stationed forward or not, when the ship has a competent crew, depends wholly upon the management or direction of the officers; or, in other words, it is a part of the "management of the ship" for which the owners are not responsible to the shippers of cargo.[53]

Sec. 382. Faults or errors in management.—"Due diligence" having been used "to make the said vessel in all respects seaworthy and properly manned, equipped and supplied," the shipowner is relieved from liability, among other things, for damage or loss resulting from "faults or errors in navigation or in the management of said vessel." Cases of difficulty may often arise as to whether the negligence which has resulted in an

50. The Valentine, 131 Fed. 352.

51. The Cygnet, 126 Fed. 742, 61 C. C. A. 348.

Where the evidence shows that the master had been duly licensed by the United States inspector of steam vessels it will be presumed, in the absence of evidence to the contrary, that he was a licensed pilot in accordance with Sec. 4401, R. S. *In re* Meyer, 74 Fed. 881.

52. The Guildhall, 58 Fed. 800; *affirmed*, 64 Fed. 867, 12 C. C. A. 445, 26 U. S. App. 414.

53. The Rosedale, 88 Fed. 324; *affirmed* in 92 Fed. 1021, 35 C. C. A. 167.

injury to cargo is to be regarded as negligence in the care of the cargo within the first section of the Act, or negligence in the management of the vessel under section three. Looking at section three it is reasonably clear that the section directly aims at negligence of the owners, agents or charterers of the vessel in respect of the navigation or management of the vessel, regarded as a vessel. But a vessel may also be regarded as a cargo-bearing carrier and moreover it may be regarded specially by the consideration of the particular cargo carried during the voyage. For faults or errors in the management of the vessel, regarded as a vessel, the shipowner is excused from liability. For faults or errors in the management of the vessel, regarded as a cargo bearing carrier, he is not excused from liability. But it is difficult, if not impossible, to attempt successfully to lay down any general principles as to when a particular set of facts falls within the operation of one rule and when it falls within the operation of the other. One must look at the facts of each case as it arises, and on those facts determine which rule to apply. The following special facts, however, are worthy of consideration in determining the question: "What was the act of negligence complained of? By whom was it committed? In particular was the man who was guilty of the negligence acting at the time as an ordinary member of the officers, engineers or crew of the ship? Was he, or not, acting in the ordinary course of his duties and on behalf of the vessel regarded as a whole, or was he acting solely, or in particular, in looking after the cargo and for the purpose of the cargo? Further, in some cases it may be important to consider whether the injury to the cargo was caused directly or indirectly by the act of negligence."[1]

1. The above questions are all propounded in Rowson *v.* Atlantic Transport Co., (1903) 2 K. B. 666, 72 L. J. K. B. 811, *affirming* (1903) 1 K. B. 114. In that case butter was delivered in a damaged condition, resulting from the negligence of one of the ship's engineers in the management of the refrigerating apparatus, whereby in the course of the voyage the temperature of the chambers was allowed to rise too high. The refrigerating apparatus was not used exclusively for the butter, but was also used for the ship's provisions. The air of all the chambers, including those used

Cases coming within section one of the Harter Act have already been treated in previous sections, and examples of cases which have been held to be faults or errors in the management of the vessel, regarded as a vessel, are given in the notes.[2]

Sec. 383. Faults or errors in navigation.—Very few cases of difficulty arise as to whether the negligence which has re-

for the ship's provisions, was cooled by one pipe, and so far as the engineer attending to that one pipe was concerned, all he had to do was to look upon it as it was, namely, as a pipe required for the general purposes of the vessel. His failure to look after the pipe, therefore, was an act of negligence by an officer of the ship in the performance of his duties to the ship as a ship, not with regard to any particular cargo, and was such an act as really concerned the management of the vessel as a whole, and, therefore, really came within the express limitation of section three.

2. In The Silvia, 171 U. S. 462, 19 Sup. Ct. R. 7, 43 L. Ed. 241, *affirming* 68 Fed. 230, 35 U. S. App. 395, the port holes of a compartment were furnished with the usual glass covers and with the usual iron shutters or deadlights. When The Silvia began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. As no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters, and as the ports were in a place where the iron shutters would be usually left open for the admission of light, and could be speedily got at and closed if occasion should require, there was no ground for holding that the ship was unseaworthy at the time of sailing, and if there was any neglect in not closing the iron covers of the port, it was a fault or error in the navigation or in the management of the ship.

In The Wildcroft, 130 Fed. 521, 65 C. C. A. 145, *affirming* 124 Fed. 631 and 126 Fed. 229, damage to sugar arising from the flowing of fresh water into the hold, where the sugar was stored, through a sea cock which had been negligently left open while water from the river was being pumped into the engine tank on the discharge of the cargo, was held a fault in the "management" of the vessel, as a vessel.

In The Merida, 107 Fed. 146, 46 C. C. A. 208, an accumulation of water in the bilges due to a lack of ordinary precautions through three engineers being prostrate with yellow fever and to the consequent failure to make use of the pump was held a fault in the "management" of the vessel, as a vessel.

In The Sandfield, 92 Fed. 663, 34 C. C. A. 612, *affirming* 79 Fed. 371, an omission to open the sluice gate, designed to empty the

sulted in an injury to cargo is to be regarded as negligence in the navigation of the ship. If a shipowner has used due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, he is not liable for damage to cargo resulting from navigation of the vessel, however faulty. Thus failure to heed the warning of a government light which

bilges, for 20 days during heavy weather, was held a fault in the "management" of the vessel, as a vessel.

In The Guadeloupe, 92 Fed. 670, an error of judgment on the part of the master as to the extent of repairs necessary during a voyage, when he uses due diligence and acts in good faith, was held to pertain to the "management" of the vessel, as a vessel.

In Steinwender *v.* The Mexican Prince, 82 Fed. 484, *affirmed* in The Mexican Prince, 91 Fed. 1003, 34 C. C. A. 168, where adequate provisions for removing water from compartments were made by means of a pipe line and pump running through each cargo compartment with an offset from the main line in each, which could be opened and closed by an easily tested Kingston valve, the vessel was held unseaworthy in respect of dry cargo near a water ballast tank by reason of the failure to provide deck sounding pipes, and the neglect of those in charge of the ship to test the valve by means of the pump or to count the turns of the spindle controlling the valve before discharging the water ballast was held to be a fault in the "management" of the vessel, as a vessel.

In The Rodney, L. R. (1900) P. 112, 69 L. J. P. 29, the ship having met with rough weather, the drainage pipe in the forecastle became choked and the forecastle was flooded with water. In order to allow the water to escape into the bilges, the boatswain endeavored to clear the pipe with a hammer and poker, with the result that a hole was driven in the syphon trap of the pipe, and the water, instead of escaping into the bilges, ran into the hold and damaged the cargo. The act of the boatswain was held to be an act done in the "management" of the ship.

In The Glenochil, (1896) Prob. 10, 65 L. J. P. 1, the ship when she left New Orleans was in a perfectly seaworthy condition, but met with exceptionally heavy weather on the voyage, with the result that certain pipes and connections had broken owing to the straining, amongst others a sounding-pipe communicating with one of the water-ballast tanks. This tank it became necessary to fill with water, as the discharge of the cargo went on, in order to stiffen the ship, and the engineer thereupon opened the cock to admit the water without first having used the sounding rod or taken any steps to ascertain the condition of the sounding pipe. The result was that the water on being admitted to the tank forced its way up the broken sounding pipe and, escaping into the hold,

indicates the location of a reef, and in presuming upon the entire accuracy of the compass or course are faults or errors in navigation within the meaning of section three.[3] So a steamer, towing a barge on which goods are loaded, is not liable for the loss of the goods due to the barge striking an obstruction in the river.[4] And a mistake of the captain in going into a bay on an ebb tide, whereby, owing to shallow water, the steamer becomes stranded, is a fault in the navigation of the ship under section three.[5]

Sec. 384. Dangers of the sea.—Questions arising under the next exemption in the third section of the Harter Act against loss from "dangers of the sea or other navigable waters" are generally linked with questions concerning the initial seaworthiness of a vessel. All that need be said here is that where the condition of the vessel at the beginning of a voyage is shown

damaged the cargo. If the engineer had used the sounding-rod before admitting the water to the ballast tank, he would have ascertained that the sounding pipe was broken. His negligence was held to be a fault in the "management" of the vessel, as a vessel.

In The Cressington, L. R. (1891) Prob. 152, 60 L. J. P. 25, a bill of lading contained the usual exceptions as to perils of the sea and other accidents of navigation being excepted, even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners, or other servants of the shipowners. The cargo was damaged by sea-water which entered the vessel's hold through a rivet hole at the foot of one of the stanchions supporting the main rail, the rivet having become loose owing to the working of the ship during bad weather. The neglect of the master, after discovering the leakage, to take proper measures to prevent its continuance was held to be within the exception in the bill of lading.

In The Ferro, L. R. (1893) Prob. 38, 62 L. J. P. 48, it was held that the words "neglect or default in the management of the ship" in a bill of lading did not exonerate the shipowners from damage to oranges caused by improper stowage.

3. The E. A. Shores, Jr., 73 Fed. 342.

4. The Nettie Quill, 124 Fed. 667.

5. *In re* Meyer, 74 Fed. 881.

A failure of the master to put in for repairs when he could have done so is a fault in the navigation of the vessel. Corsar *v.* Spreckels & Bros. Co., —— C. C. A. ——, 141 Fed. 260, *modifying* The Musselcrag, 125 Fed. 786.

to have been good in all respects and it satisfactorily appears that the vessel incurred marine perils which might well disable a staunch and well manned ship and are sufficient to account for the defects in the vessel causing damage to cargo, the vessel owner will not be liable for such damage to the cargo.[6]

Sec. 385. The inherent defect, quality or vice of the thing carried.—A shipowner who has used due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied will not be liable for damage due entirely to "the inherent defect, quality, or vice of the thing carried." Thus cargoes of hay are apt to sweat during damp weather, especially where there is a lack of ventilation, and in a case where the hay was confined for an undue period, owing to no fault of the carrier, and it became affected and damaged by sweat, the court held that the carrier was not liable.[7] But such a case is radically different from one where the cargo is only indirectly damaged by its own inherent defects and the direct cause of the damage is unseaworthiness of the ship brought about by a failure of the shipowner to guard against injury to the vessel from the well known characteristics of the cargo carried. The shipowner in such case will be liable for failure to use due diligence to make his vessel seaworthy.[8]

6. The Hyades, 124 Fed. 58, 59 C. C. A. 424, *affirming* 118 Fed. 85; Davidson S. S. Co. *v.* 119, 254 Bushels of Flaxseed, 117 Fed. 283; Grulman *v.* The Ontario, 115 Fed. 769, 53 C. C. A. 199, *affirming* 106 Fed. 324; The Marechal Suchet, 112, Fed. 440; The Sandfield, 92 Fed. 663, 34 C. C. A. 612, *affirming* 79 Fed. 371; The Warren Adams, 74 Fed. 413, 20 C. C. A. 486, 38 U. S. App. 356, writ of *certiorari* denied, 163 U. S. 679; The Sintram, 64 Fed. 884; The Marlborough, 47 Fed. 667.

In The Samuel F. Houseman, 108 Fed. 875, 48 C. C. A. 120, *reversing* 103 Fed. 663, it was held that the sinking of a barge was due to a storm, and the consequent pressing together of two large steamships, between which she was lying, and not to unseaworthiness.

In The Homeric, 106 Fed. 960, a defect in the propeller after a tempestuous voyage was held to have arisen from perils of the sea.

7. The M. C. Currie, 132 Fed. 125.

8. The Alvena, 79 Fed. 974, 25 C. C. A. 261, *affirming* 74 Fed. 252. A cargo of sugar was damaged in this case by water coming through the bottom of the ship.

Sec. 386. Effect of deviation.—Every vessel transporting merchandise and passengers to or from different ports—her owners having exercised due diligence to make her in all respects seaworthy, and properly manned, equipped and supplied—has the right to deviate for the purpose of saving life and property, even if the bill of lading contains no stipulation allowing such deviation for salvage purposes,[9] but as soon as this duty is performed, her right of deviation ceases, and it becomes her duty then to pursue her regular voyage and fulfill her contracts by carrying her cargo and passengers to their port of destination. The Harter Act was not passed for the purpose of enabling vessels, saving life and property at sea, to earn salvage. That right is only incidental to such service.[10]

Sec. 387. Effect of the Harter Act on damages recoverable by cargo owner or on rights of a general average contribution.—It was not the intention of the Harter Act to allow the shipowner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship.[11] While the shipowner, however, freed from liability under the statutes, may not invoke an action for general average adjustment, to obtain payment of his own losses, the cargo owner may do so; but as the statutes prevent his recovering any damages based upon the shipowner's alleged negligence, the cargo owner may not, in the adjustment invoked

The hole was caused by a failure of the shipowner to guard against the well-known corrosive action of the sugar drainage upon the iron plate of the steamer, and the vessel was held liable.

The melting of asphalt in the warm climate of a port of shipment is not an "inherent defect, quality, or vice of the thing carried," but on the contrary it is one of its natural qualities in view of which a charterer may well stipulate in the charter for special fittings in the vessel. Hine *v.* New York & Bermudez Co., 68 Fed. 920.

9. *In re* Meyer, 74 Fed. 881; The Chinese Prince, 61 Fed. 697; see also The Wells City, 61 Fed. 857, 10 C. C. A. 123, 26 U. S. App. 76, *affirming* 57 Fed. 317.

10. *In re* Meyer, 74 Fed. 881.

11. The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130; on certification from Flint *v.* Chrystal, 83 Fed. 987, 31 C. C. A. 593, and *reversing* Chrystal *v.* Flint, 82 Fed. 472; Trinidad Shipping, etc. Co. *v.* Frame, 88 Fed. 528.

by him, derive any benefit from such alleged negligence. In such case the usual rule of reciprocity of right and obligation exists, and the adjustment should be made as if there was no negligence in the case, there being none in fact on the part of the owners.[12] Nor is the shipper entitled to look for damages to the vessels or owners, or to any funds in court representing such vessel and freight pending.[13]

The liability of one vessel to other vessels with which it may collide is not affected by the Harter Act which only applies to the relations between a vessel and her cargo.[14] In relieving the carrier vessel and her owners from their responsibility for their half of the damage to the cargo, the Act was not designed to increase thereby the damage payable in such cases by the other vessel.[15] Nor does the act affect the operation of the equitable rule which gives priority to the claim of the innocent cargo owners over that of the vessel owner against the fund available for the payment of damages sustained through a collision for which both vessels have been adjudged in fault.[16]

12. The Strathdon, 94 Fed. 206.

13. *In re* California Nav. & Imp. Co., 110 Fed. 678.

14. The Viola, 60 Fed. 296, *s. c.* 59 Fed. 632; The Berkshire, 59 Fed. 1007.

15. The Rosedale, 88 Fed. 324, *affirmed*, 92 Fed. 1021, 35 C. C. A. 167.

16. The George W. Roby, 111 Fed. 601, 49 C. C. A. 481, *modifying* 103 Fed. 328.

CHAPTER VII.

OF THE LIMITATION OF THE CARRIER'S LIABILITY BY CONTRACT.

§ 388. Goods usually shipped under contracts limiting liability.

389. Rigor of common-law rule relaxed.

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440. Same subject—Weight of English cases.
441. Same subject—Notice from course of dealing.
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459. Same subject—How where carrier has notice that authority of agent is restricted.
460. Powers of agents of carriers to bind them by contract.
461. Same subject—The English rule.
462. Same subject—Implied authority.
463. What will be construed as a contract exempting from liability for negligence—Language must be clear.
464. Contracts limiting liability must be construed strictly against the carrier.
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468. Same subject — Ambiguous words construed against carrier.
469. Same subject.
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471. Same subject.
472. Same subject — Limitation inures to benefit of connecting carrier only when contract for through carriage exists.

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474. By what law contract is to be construed.
475. The consideration necessary to uphold such contracts.
476. Contract must have a fair construction.
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478. Carrier liable, though exemption from negligence would otherwise be sustained, if loss occasioned by his misfeasance.
479. Or, though exemption be for losses resulting from delay, if delay is occasioned by negligence.
480. Or if he departs from the stipulated method of transportation—When departure will be excused.
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486. Same subject—Hidden obstructions.
487. Same subject—Other perils.
488. Same subject.
489. Same subject—Other perils —Fire not included.
490. Same subject—How question determined.
491. Same subject—Carrier liable, notwithstanding exception, for loss from theft, embezzlement, robbery, etc.
492. Same subject—Carrier liable notwithstanding exemption if loss caused by negligence.

Sec. 388. (§ 225.) Goods usually shipped under contracts limiting liability.—The bill of lading or receipt of the carrier, so far as it is a mere acknowledgment of the delivery of the goods and a contract to carry them, has already been treated of. But this instrument is made use of to serve another purpose. We have already seen that carriers are now allowed to contract with their employers so as very greatly to qualify and diminish the liability imposed upon them by the common law. Goods are in fact now but rarely accepted by them without an agreement or contract for such limitation; and, it being important that such contracts should be reduced to writing, no more natural or convenient place can be found for them than in the same instrument which evidences their receipt and the contract to transport them. Hence it has become the universal practice

for carriers, both by land and water, to include in their bills of lading the terms as to liability upon which they accept the goods, which, when accepted by the shipper, are the conditions upon which the carrying is to be done, and are binding upon both parties, provided they are such as can be lawfully agreed upon. And such contracts are not to be regarded as made solely in the interest or for the exclusive benefit of the carrier, though they universally qualify and moderate the harsh terms imposed upon him by the law when no express contract is made with his employer. It is supposed, however the fact may be, that, the liability of the carrier being lessened, terms correspondingly favorable have been gained by the shipper, and that thus the advantage from such contracts is to some extent mutual. It often happens that the shipper may desire by contract to vary the terms upon which alone the carrier could be compelled to receive and carry his goods, as, for instance, to bind him by what is known as a through contract, where they must necessarily be passed over several lines of connecting carriers to reach their destination. In such cases, as we have seen, the law generally in this country binds the carrier to convey only to the end of his own route and there deliver to the next succeeding carrier; but still it is perfectly competent for the carrier who first receives the goods to bind himself for the entire transportation and to be responsible for the safety of the goods until they reach their destination; and in such cases if they be lost the owner may look to him to be made whole, without undertaking the difficult task of ascertaining where the fault was or of resorting to his legal remedy in a distant state. So it frequently happens that, by entering into a contract with the carrier limiting his liability, the shipper may obtain transportation at greatly reduced rates, which he may regard as a matter of more importance to him than the liability of the carrier. Other instances might be given, but these are sufficient to show that such contracts are not always and altogether for the benefit of the carrier.

Sec. 389. (§ 226.) Rigor of common-law rule relaxed.— These considerations, together with the further fact that, owing

to the improved state of society and the rapidity and comparative safety of modern modes of carriage, there is not now the same necessity as formerly existed for holding carriers to the rigorous accountability of insurers against all losses except those caused by the act of God or of the public enemy, have induced the courts of many of the states of this country to relax the rigor of this rule at least in so far as to permit the carrier to qualify this liability by express contract with his employer.[1]

Sec. 390. (§ 227.) Rule permitting limitation of liability by contract of early origin in England.—In England it has been from very early times the law that such contracts might be entered into not only expressly but by notice to the owner of the goods. The first reference to the subject is to be found in a note to Southcote's Case,[2] in which Lord Coke says that, if goods are delivered to one person to be delivered over to another, it is good policy for him to provide for himself in special manner "for doubt of being charged with his general acceptance;" and this language has been generally understood as having reference to the carrier as bailee; but this seems to be uncertain. In Morse *v.* Slue.[3] it was said by Lord Hale that the

1. Since the duties of a common carrier are public in their nature, the tendency of the courts formerly was to hold that it was against public policy, or as otherwise expressed, not just and reasonable to permit a common carrier to stipulate for any modification of his common law liability even by special contract with his customer. But in course of time the improved state of society, the introduction of better and safer modes of transportation, the diminished opportunities for collusion and bad faith on the part of the carrier, and other considerations, rendered less imperative the rigorous application of the iron rule of the common law. The result has been that the courts now uphold as just and reasonable numerous limitations to, or exemptions from the common law liability of carriers which would formerly have been against public policy and void. In fact, it has now become the accepted general business usage, (which is itself strong evidence as to what is in accord with public policy) for carriers and shippers to contract for some exemptions from the strict liability imposed by the common law. Alair *v.* Railroad Co., 53 Minn. 160, 54 N. W. Rep. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764.

2. 4 Coke, 84.

3. 1 Ventris, 238.

master of the ship "might have made a caution for himself." Nearly a century intervened during which time we find no allusion to the subject until the case of Gibbon *v.* Paynton,[4] in which the attempt was made to hold the carrier liable for money delivered to him concealed in a bag filled with hay, the carrier having given notice that he would not be liable for money unless informed of the fact.[5] Lord Mansfield, as we have seen, rested his decision upon the fraud; but the other judges considered the notice as equivalent to a special acceptance, thus assuming that the carrier could in this way limit his liability. The next heard of such special acceptance was in Forward *v.* Pittard[6] before the same court, in 1785, until which Burrough, J., says the doctrine of notices by carriers was never known in Westminster Hall.[7]

Sec. 391. (§ 228.) Same subject—Notice sufficient.—At length in 1804, in the case of Nicholson *v.* Willan,[8] the question as to the validity of such notices came up directly for decision before Lord Ellenborough, in the king's bench. The defendants, who were carriers, had put up a notice on a board in their office, of which the plaintiff knew, that they would not be liable for any package whatever above the value of £5, unless insured and paid for at the time of delivery, and unless, if lost, its value should be demanded in one month after such damage was sustained. The parcel in question contained £58, of which no notice was given to the defendants. After a *curia advisari vult*, Lord Ellenborough delivered his judgment in which he said: "Considering the length of time during which and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation and with the allowance of courts of justice, and with the sanction and countenance of the legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing

4. 4 Burr. 2298 (A. D. 1769).
5. *Ante*, § 330.
6. 1 T. R. 27.
7. Smith *v.* Horne, 8 Taunt, 146.
8. 5 East, 507.

the carrier's responsibility in certain cases, on the ground of such a measure being unnecessary, inasmuch as carriers were deemed fully competent to limit their own responsibility in all cases by special contract; considering also that there is no case to be met with in the books in which the right of the carrier thus to limit his own responsibility by special contract has ever been by express decision denied, we cannot do otherwise than sustain such right, however liable to abuse and productive of inconvenience it may be, leaving to the legislature if it shall think fit to apply such remedy hereafter as the evil may require." And the judgment was that the plaintiff could not recover even the £5 which the jury had found for him. And Lord Kenyon in another case said: "When no rate is fixed by law, the carrier is entitled to say on what terms he will carry; he is not obliged to take everything that is brought to his warehouse unless the terms on which he chooses to undertake the risk are complied with by the person who employs him. The old mode of declaring used to be on the custom of the realm, but this is in *assumpsit;* it is founded on contract, and the contract must therefore govern the parties."[9]

Sec. 392. (§ 229.) Same subject—Extent of limitation—Anything except gross negligence or misfeasance.—From the time of these decisions, many cases are to be found in the English reports expressly recognizing the right of the carrier at common law to limit his liability for loss or injury to the goods, resulting from any cause whatever, even the felony of his own servants, except his own gross negligence or misfeasance, either by express contract with his employer, by special acceptance or by public notice brought to his knowledge.[10] The mode resorted to, however, in the great majority of the cases was that

9. Anonymous *v.* Jackson, Peake's Addl. Cas. 185.

10. Batson *v.* Donovan, 4 B. & Ald. 21; Mayhew *v.* Eames, 3 B. & C. 601; Maving *v.* Todd, 1 Starkie, 72; Leeson *v.* Holt, *id.* 186; Riley *v.* Horne, 5 Bing. 217; Butt *v.* Railway, 11 Com. B. 140; Brooke *v.* Pickwick, 4 Bing. 218; Smith *v.* Horne, 8 Taunt. 144; Birkett *v.* Willan, 2 B. & Ald. 356; Garnett *v.* Willan, 5 *id.* 53; Sleat *v.* Fagg, *id.* 342; Wyld *v.* Pickford, 8 M. & W. 443.

of public notice, which according to all of them, if brought to the knowledge of the owner of the goods, constituted what was called a special or qualified acceptance by the carrier, and was the contract of the parties.[11]

Sec. 393. (§ 230.) Considerations leading to English Land Carriers' Act.—But it was, in many instances, impossible for the carrier to prove knowledge of the notice by his employer; and many questions arose as to what should be sufficient evidence that notice had come to his knowledge; whether it was to be presumed that he had seen it in a newspaper which he had been accustomed to read, or whether he had seen it posted up in the office where the carrier transacted his business. Questions also arose as to the construction to be put upon the various forms of notices. And these considerations, in connection with the frauds which were being practiced upon carriers by concealments of value and the frequent hardships upon them caused by the carelessness of their servants, induced the legislature to pass the act of 11 Geo. IV. and 1 William IV. (1830), commonly known as the English Land Carriers' Act.[12]

Sec. 394. (§ 231.) Summary of act.—The object of this act, as stated in its title, was the more effectual protection of carriers for hire against loss or injury to parcels or packages delivered to them for conveyance or custody, the value or contents of which shall not be declared to them by the owners; and after a preamble which recites that by reason of the frequent practices

11. Those whose curiosity may prompt them to investigate the state of the English law upon this subject previous to the passage of the English Land Carriers' Act (1830) will find the cases cited and commented upon at length by Bronson and Cowen, JJ., in Hollister *v.* Nowlen and Cole *v.* Goodwin, 19 Wend. 234, 251, in The N. Y. Cent. R. R. *v.* Lockwood, 17 Wall. 357, and in Sager *v.* The Railway Co., 31 Me. 228.

The Supreme Court of Georgia in the case of Cooper *v.* Railroad Co., 110 Ga. 659, 36 S. E. Rep. 240, followed the English rule and held that a contract exempting the carrier from liability excepting for losses occasioned by fraud or gross negligence was neither unreasonable nor illegal, and that the carrier would be excused on proof that slight diligence had been exercised.

12. Hinton *v.* Dibbin, 2 Ad. & El. (N. S.) 646.

of bankers and others sending by public conveyances for hire, parcels and packages containing articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of such common carriers is greatly increased; and by the frequent omission of the persons sending such parcels to notify the value and nature of the contents thereof, so as to enable such carriers to protect themselves against losses, and the difficulty of fixing parties with knowledge of notices published to limit their responsibility, they have sustained heavy losses, it is enacted that no such common carrier shall be liable for the loss of or injury to any of the articles therein named above the value of £10, not occasioned by the felonious acts of his servants or his own personal negligence, unless at the time of the delivery thereof at the office of such carrier, the value and nature of such property shall have been declared and the increased charges authorized by the act shall have been paid; and further, that no public notice or declaration should thereafter exempt any carrier from his liability at common law for the loss or injury to any articles other than those specified in the act, but that as to such other articles his liability as at common law should remain, notwithstanding such notice; and provided, also, that the act should not be so construed as in anywise to affect any special contract with the carrier.[13]

Sec. 395. (§ 232.) Construction of act.—Commenting upon this act, the English judges have said that protection to carriers was its object, as its title imports, and that they would not put upon it a more limited construction than its language required. Hence, they have held that although public notices will no longer avail the carrier in limiting his liability, special contracts for that purpose are still allowed and are not affected by the act; and that if notice be given to the customer of the carrier, and he subsequently sends his goods to be carried without objection to the terms of the notice, he is bound by them. So that the validity and effect of notices other than such as are called

13. This act, so far as it affects the question of the liability of the carrier, will be found set out in full in Story on Bailments, §§ 554*a*, 554*b* and 554*c*.

public remain the same as before the act.[14] And in numerous cases it has been decided that he may protect himself by such notices against loss caused by the negligence of his servants though not against such as are occasioned by their felonious acts. Nor is it material, under this act, in what manner the contract is made. Neither writing nor signing nor any other formality is required, the question in every case being one of fact, whether there was such a contract (Walker *v.* Railway, *supra*). And, although a mere public notice may not be sufficient, if a ticket containing such notice be delivered to the customer or his agent, it will suffice to limit the carrier's liability, whether it was read over or explained or understood by him or not.[15]

Sec. 396. (§ 233.) Modification of Carriers' Act by Railway and Canal Traffic Act.—The Carriers' Act was, however, somewhat modified by the legislature in 1854, by what is known as the Railway and Canal Traffic Act, as to the class of carriers indicated by its title, so far as to prohibit such carriers from limiting their liability by "notice, condition or declaration;" provided, however, that nothing contained in the act shall be construed to prevent said companies from making such conditions as to the terms of carriage as shall be signed by the shipper and adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable; and further, that the amount of recovery, in case of loss, for the various articles therein enumerated shall not exceed a certain designated sum, varying according to the nature of the article to be carried, unless the shipper shall declare them to be of higher value and pay additional compensation for the increased risk and care thereby occasioned. But the act expressly excepts from its provisions all such articles as are named in the general Carriers' Act.

Sec. 397. (§ 234.) Same subject—Effect of latter act.—The material alteration effected by this latter act, as will be observed,

14. Walker *v.* Railway, 2 Ellis & B, 750; Austin *v.* Railway, 10 C. B. 454; Carr *v.* Railway, 7 Exch. 707; Fowles *v.* Railway, *id.* 699.

15. Gr. N. Ry. *v.* Marville, 7 Rail. Cas. 830; Palmer *v.* Railway, 4 M. & W. 749.

is that by this act railway and canal companies can limit their liability as carriers of the articles enumerated in it only by special contract signed by the shipper which shall be adjudged by the courts to be reasonable and just. Many cases under this act have come before the judges requiring decision as to whether conditions or stipulations in such contracts were just and reasonable; and, following the cases under the Carriers' Act, it has been repeatedly determined that while a contract which relieves the carrier from all liability is not reasonable, it is so when it stipulates that he shall not be held liable for losses caused by the negligence of himself or his servants.[16]

16. This act having given an unlimited discretion to the courts to determine what are reasonable and what are unreasonable conditions in contracts between carriers and their employers, it will be interesting as well as instructive to know, as far as the cases inform us, what has been considered just and reasonable in such cases, and by what principles the courts have been guided in coming to their conclusions.

In Peek *v.* The Railway Co., 10 H. L. Cases, 473, the contract was that the company would not be responsible for loss of or injury to the goods unless declared and insured according to their value. The Lord Chancellor (Westbury), speaking to the question of its reasonableness, said: "If the present condition were introduced in a contract between the company and the owner of the goods, delivered to be carried by that company, the necessary effect of such a contract would be that it would exempt the company from responsibility for the injury, however caused, including, therefore, gross negligence and even fraud and dishonesty on the part of the servants of the company, for the condition was expressed without any limitation or exception. I am therefore, in the first place, clearly of opinion that the condition insisted on by the company, even if it had been duly embodied in a special contract between the parties, is a condition which it would be the duty of a court or judge to hold to be neither just nor reasonable."

In Aldridge *v.* The Railway Co., 15 Com. B. (N. S.) 582, certain goods consisting of empty packages which had already been carried over the road were sent back according to custom, without further charge.

The printed contract provided that the company would not be answerable for the loss or detention of, or damage to, packages of any description charged by the company as empties. This condition was considered unreasonable. There was a consideration for the return carriage of these empty packages in the amount paid for their carriage to the place from which they were to be returned, and their return free was only one of the inducements held out

Sec. 398. Same subject—Language of contract to relieve from negligence must be explicit.—But while the carrier under the latter act may stipulate against liability for losses occasioned by negligence, the language of the stipulation must, in

to the public to send full packages. The return carriage was therefore for a consideration, and the company could not therefore divest itself of all liability.

In McManus *v.* Railway Co., 4 H. & N. 327, the plaintiff desiring to send horses by the company's road signed a ticket containing the condition that the owner of the horses should undertake all the risk of conveyance whatsoever, as the company would not be responsible for any injury or damage, however caused, occurring to live stock of any description traveling upon the railway or in its vehicles. The horses were injured by being put into an insufficient truck, and it was held that the contract was not just and reasonable and was therefore void.

In Lewis *v.* Railway Co., 5 H. & N. 867, and in Simons *v.* Railway Co., 18 Com. B. 805, the condition was that no claim for deficiency, damage or detention would be allowed unless made within three days after the delivery of the goods, nor for loss unless made within seven days after the time when they should have been delivered. A part of the goods were lost but no claim was made until more than seven days from the time when they should have been delivered, and it was held that the condition was reasonable and that the company had a good defense to the action on the ground that the claim had not been made within the seven days.

A condition that a railway company should not be liable for a loss of market or other delay arising from detention is a reasonable condition. White *v.* Railway Co., 2 Com. B. (N. S.) 7. But a condition not to be liable for delay however caused is unreasonable. Kirby v. Railway Co. 18 L. T. (N. S.) 658.

A condition that the company will not be answerable for damage done to any horse conveyed by a railway is reasonable. Wise *v.* Railway Co., 1 H. & N. 63. So a condition that the company was to be held "free from all risk in respect of any damages arising in the loading or unloading, from suffocation or from being trampled upon, bruised or otherwise injured in transit, from fire or from any other cause whatsoever," was held reasonable. Pardington *v.* Railway Co., 1 H. & N. 392. It is also held reasonable to stipulate that horses shall be carried at the owner's risk. McCance *v.* Railway Co., 7 H. & N. 477.

It has also been held reasonable to give public notice that perishable or fragile articles will be conveyed only by special agreement or by particular trains, and that the carrier shall not be held responsible for the loss of market, or for loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever, other

order to be effective, be clear and express. Thus an exemption from liability contained in general words which do not expressly relate to negligence will be construed as limiting the carrier's liability as an insurer only, and not as relieving him from the duty of exercising reasonable skill and care. If he will relieve himself from the duty of exercising reasonable skill and care, it is said, he must do so in plain language and explicitly, and not by general words.[17]

Sec. 399. (§ 235.) Early American cases.—In this country the contest between the carrier and his employer upon this ques-

than gross neglect or fraud. Beal *v.* Railway Co., 3 H. & C. 337. It has also been held reasonable for railway companies to make distinctions in the conditions for carriage by different kinds of trains. Thus, in a case where the owner of horses, knowing that there was a certain rate for carrying horses by a passenger train and a lower rate for their conveyance by a freight train, sent them by the former at his own risk, it was held that, as there was an alternative mode of conveyance, the condition was reasonable. Harrison *v.* Railway Co., 2 Best & S. 122. Thus, it appears that a carrier may have two modes of conveyance—one by which he takes a greater responsibility and charges a higher rate; the other by which he charges a cheaper rate and takes upon himself less responsibility.

In Simons *v.* Railway Co., 18 Com. B. 805, it was decided that a condition that the company would not be liable for loss from delay, detention or damage to goods improperly packed was unreasonable. And in this case it was said that there were no fixed or established rules by which the courts could be governed in concluding whether or not particular conditions in contracts of this character were just and reasonable or not; but that each case must be determined upon its own circumstances.

In Rooth *v.* Railway Co., 2 Law R. Ct. of Exch. 173, 15 L. T. (N. S.) 624, the condition was that the owner should undertake all risks of loading, unloading and carriage, whether arising from negligence or default of the company or its servants, or imperfections in stations, platforms or other places of loading or unloading, or of the carriage in which the cattle might be loaded or conveyed, or from any other cause whatever; in consideration of which the company would grant free passes to persons having care of the stock as an inducement to the owners to send proper persons to take care of them. This was considered neither just nor reasonable, the offer of free passes not having the effect of changing the character of the first clause.

17. The Pearlmoor, L. R. (1904) P. 286, 73 L. J. P. 50.

tion of the carrier's right to limit his extraordinary common-law liability, commenced, so far as the cases show, in 1838, before the supreme court of the state of New York, with the well-known cases of Hollister *v.* Nowlen and Cole *v.* Goodwin.[18] Both turned upon the validity of public notices by stage-coach proprietors that all baggage should be at the risk of the owners. Although the amount involved in the cases was of but little value, they seem to have been of great interest, on account of the question involved, for each of them was argued twice before the court. The difficulty with the judges was whether they should follow the decisions of the English courts, which, as we have seen, had long before decided in favor of such notices, or disregard such authority as post-revolutionary, and, upon grounds of public policy, decide the question differently. Their conclusion, after great deliberation, was that, by the common law, carriers never had the right to limit their liability by such notices, though brought to the knowledge of their employers, and that, on grounds of public policy, it ought not to be allowed that they should; thus arriving at a conclusion directly opposite, on both grounds, to that to which, as we have seen, the English judges had come.

Sec. 400. (§ 236.) Same subject.—As the question did not arise in these cases as to the carrier's power to restrict his liability by express or special contract with the bailor, the court expressly declined to decide whether this could be done. A few years afterwards, however, this very question came before the same court in Gould *v.* Hill.[19] In that case the carrier had given a receipt for the goods, in which it was stipulated that he would forward them, "danger of fire excepted, and not holding ourselves responsible if lost, stolen or damaged, beyond the value of $200." The goods were destroyed by fire on their passage by the negligence of the carrier. The court below instructed, and the jury found, for the defendant. But the judgment was reversed in the supreme court, Nelson, C. J., dissenting; and it was held that, on grounds of public policy, the carrier could

18. 19 Wend. 251. 19. 2 Hill, 623.

not vary or qualify his common-law liability, either by contract or notice, Cowen, J., who gave the opinion of the court, saying that he could no more regard a special acceptance as operating to take from the duty of the carrier than a general one, and that the one was as much a contract as the other, the only difference being in the different kind of evidence by which the contract was made out.

Sec. 401. (§ 237.) Carrier may limit liability by special contract.—But a few years after this decision, the very same question came before the supreme court of the United States in the case of The New Jersey Steam Navigation Company *v.* The Merchants' Bank,[20] and the ruling in Gould *v.* Hill was disapproved, the court being unanimously of the opinion that a common carrier might, at least by special contract, restrict his liability. This decision was soon followed in the courts of New York, in which the decision in Gould *v.* Hill was abandoned as untenable,[21] and the right of the carrier thus to limit his responsibility has ever since remained unquestioned in that state, and may now be stated as the well settled law of most of our states,[22] as well as of the supreme court of the United States.[23]

20. 6 How. 344.

21. Parsons *v.* Monteath, 13 Barb. 353; Morse *v.* Evans, 14 *id.* 524; Dorr *v.* N. J. S. Nav. Co., 1 Ker. 485; Stoddard *v.* Railroad, 5 Sand. 180.

22. *Connecticut:* Camp *v.* Steamboat Co., 43 Conn. 333; Mears *v.* Railroad Co., 75 Conn. 171, 52 Atl. Rep. 610, 96 Am. St. Rep. 192, 56 L. R. A. 884.

Georgia: Cooper *v.* Railroad Co., 110 Ga. 659, 36 S. E. Rep. 240, citing Hutchinson on Carr.

Illinois: Ill. Cent. R. R. *v.* Morrison, 19 Ill. 136; W. Trans. Co. *v.* Newhall, 24 Ill. 466; Adams Ex. Co. *v.* Haynes, 42 Ill. 89; Am. Ex. Co. *v.* Schier, 55 Ill. 140; Ill. Cent. R. R. Co. *v.* Frankenberg, 54 Ill. 88.

Indiana: Evansville, etc. R. R. *v.* Young, 28 Ind. 516; Indianapolis, etc. R. R. *v.* Allen, 31 Ind. 394; Michigan, etc. R. R. *v.* Heaton, 37 Ind. 448; Adams Ex. Co. *v.* Fendrick, 38 Ind. 150.

Iowa: Mulligan *v.* The Railroad, 36 Iowa, 181.

Kansas: Kallman *v.* Ex. Co., 3 Kan. 205.

Louisiana: Roberts *v.* Riley, 15 La. Ann. 103; New Orleans Ins. Co. *v.* Railroad Co., 20 La. Ann. 302; Simon *v.* The Fung Shuey, 21 La. Ann. 363.

Maine: Fillebrown *v.* Railroad Co., 55 Me. 462; Morse *v.* Railway Co., 97 Me. 77, 53 Atl. Rep. 874.

Massachusetts: Judson *v.* Railroad Co., 6 Allen, 486; Perry *v.*

The validity of such special contracts has indeed been nowhere denied, and the case of Gould *v.* Hill stands as the only reported case in which the right of the carrier to limit his liability in

Thompson, 98 Mass. 249; Grace *v.* Ex. Co., 100 Mass. 505; Hoadley *v.* N. T. Co., 115 Mass. 304; Orndorff *v.* Adams Ex. Co., B. Cush. 194; Adams Ex. Co. *v.* Loeb, 7 Cush. 501; Adams Ex. Co. *v.* Guthrie, 9 Cush. 78; Cox *v.* Railroad Co., 170 Mass. 129, 49 N. E. Rep. 97.

Maryland: McCann *v.* The Railroad Co., 20 Md. 202.

Michigan: Am. Trans. Co. *v.* Moore, 5 Mich. 368; McMillan *v.* The Railroad, 16 Mich. 79; Smith *v.* Express Co., 108 Mich. 572; 66 N. W. Rep. 479.

Minnesota: O'Malley *v.* The Railway, 86 Minn. 580, 90 N. W. Rep. 974.

Mississippi: Southern Ex. Co. *v.* Moon, 39 Miss. 822; Mobile, etc. R. Co. *v.* Weiner, 49 Miss. 725.

Missouri: Rice *v.* The Railroad, 63 Mo. 314; Snider *v.* The Express Co., 63 Mo. 376; Read *v.* The Railroad, 60 Mo. 199; Wolf *v.* The Express Co., 43 Mo. 421.

New Jersey: Ashmore *v.* Penn. etc. Co., 4 Dutcher, 180; Taylor *v.* The Railroad, 8 N. J. Law, 149.

New York: Stedman *v.* W. Trans. Co., 48 Barb. 97; Westcott *v.* Fargo, 63 Barb. 353, *s. c.* 61 N. Y. 542; Magnin *v.* Dinsmore, 56 N. Y. 168.

North Carolina: Smith *v.* Railroad Co., 64 N. Cor. 235.

Ohio: Davidson *v.* Graham, 2 Ohio St. 131.

Pennsylvania: Camden, etc. R. R. *v.* Baldauf, 16 Penn. St. 67; Verner *v.* Sweitzer, 32 Penn. St. 208; Farnham *v.* Railroad Co. 55 Penn. St. 53.

Rhode Island: Ballou *v.* Earle, 17 R. I. 441, 22 Atl. Rep. 1113, 33 Am. St. Rep. 881, 14 L. R. A. 433.

South Carolina: Swindler *v.* Hilliard, 2 Rich. 286.

Tennessee: Nashville, etc. R. R. *v.* Jackson, 6 Heisk. 271; Olwell *v.* Adams Ex. Co. (Tenn. S. Court, 1874) 1 Cen. Law Journal, 186; Railway Co. *v.* Stone & Haslett, 112 Tenn. 348, 79 S. W. Rep. 1031, 105 Am. St. Rep. 955.

Vermont: Kimbal *v.* Railroad Co., 26 Vt. 247; Davis *v.* Railroad Co., 66 Vt. 290, 29 Atl. Rep. 313, 44 Am. St. Rep. 852.

Virginia: Va. & Tenn. R. R. *v.* Sayers, 26 Grattan, 328.

West Virginia: Baltimore, etc. R. R. Co. *v.* Skeels, 3 W. Va. 556; Zouch *v.* The Railway, 36 W. Va. 524, 15 S. E. Rep. 185, 17 L. R. A. 116, citing Hutchinson on Carr.

Wisconsin: Boorman *v.* Ex. Co., 21 Wis. 152.

23. Philadelphia & Reading R. R. *v.* Derby, 14 How. 468; The S. B. New World *v.* King, 16 *id.* 469; York Company *v.* The Railroad, 3 Wall. 107; Express Co. *v.* Kountze, 8 id. 342; N. Y. Cent. R. R. *v.* Lockwood, 17 *id.* 357; Bank of Kentucky *v.* Adams Ex. Co., 93 U. S. 174; Cau *v.* The Railway, 194 U. S. 427, *affirming* 113 Fed. 91, 51 C. C. A. 76.

See also, Washburn Crosby Co. *v.* Johnston & Co., 125 Fed. 273, 60 C. C. A. 187; Saunders *v.* Railway Co., 128 Fed. 15, 62 C. C. A. 523.

this way is held to be unlawful. It may therefore be stated as the universal law of this country, that, in the absence of a statute prohibiting it, all common carriers may, by express or special contract with their employer, be exonerated from that rigorous rule of the common law which in the absence of contract makes them insurers of the safety of the goods intrusted to them.

Sec. 402. (§ 237a.) Same subject—Contract must be express.—In order, however, to effect such a limitation, it is well settled, as the rule itself clearly indicates, that the contract by which the exemption is secured must be clear, special and express. The immunity cannot arise from inference or from the use of general or ambiguous terms.[24]

Sec. 403. Same subject—Such limitations result from shipper's waiver of common-law liability.—The fundamental idea of a contract involves a meeting of the minds of the parties and requires a mutuality of assent. It is obvious, therefore, that the result attained, namely, the limitation of the carrier's common-law liability, is not the fruit of his *ex parte* action but of the mutual assent of himself and his employer. In other words, as has been clearly pointed out in several cases, the carrier cannot himself *restrict* his liability at all; that liability is imposed by law, and the utmost that the law admits is that the employer may, when he deems it for his advantage, by special contract *release* the carrier from a portion of that liability which the law would otherwise impose upon him.[25]

Sec. 404. Same subject—But shipper must be allowed real freedom of choice between restricted or common-law liability.—In order, therefore, to render the contract restricting the carrier's liability binding upon the owner of the goods, it must appear that at the time the goods were accepted for transportation the carrier stood ready and willing to assume with respect

24. Westcott *v.* Fargo, 61 N. Y. 542; Magnin *v.* Dinsmore, 56 N. Y. 168; Mynard *v.* Railroad Co., 71 N. Y. 180; Nicholas *v.* Railroad Co., 89 N. Y. 370; Saunders *v.* The Railway, 128 Fed. 15, 62 C. C. A. 523.

25. See McMillan *v.* Railroad

to them the full measure of responsibility imposed by the common law, or, in other words, that the owner was allowed a reasonable and *bona fide* alternative or a real freedom of choice between shipping the goods subject to the terms of a special contract or under the carrier's liability as an insurer.[26] It is not necessary, however, to conclude the owner by the terms of a special contract, that he should actually have been offered the option of shipping subject to the terms of such contract or under the carrier's liability as an insurer. It will be sufficient if it would have been given had the owner demanded it.[27] But if such demand would have been unavailing, the owner would be under no duty to make it, and his assent to a contract restricting

Co., 16 Mich. 79, per Cooley, J.; Mich. Cent. R. R. Co. *v.* Hale, 6 Mich. 243, per Martin, C. J.

26. Railway Co. *v.* Cravens, 57 Ark. 112, 20 S. W. Rep. 803, 38 Am. St. Rep. 230, 18 L. R. A. 527; Louisville, etc. R. Co. *v.* Gilbert, 88 Tenn. 430, 12 S. W. Rep. 1018, 7 L. R. A. 162; Deming *v.* Merchants' Cotton Press & Storage Co., 90 Tenn. (6 Pickle) 306, 17 S. W. Rep. 89, 13 L. R. A. 518; Railroad Co. *v.* Craig, 102 Tenn. 298, 52 S. W. Rep. 164; Railroad Co. *v.* Dill, 48 Kan. 210, 29 Pac. Rep. 148; Pacific Express Co. *v.* Wallace, 60 Ark. 100; 29 S. W. Rep. 32.

If the carrier has two rates,—one if the goods are carried subject to the common-law liability, and the other if carried under a limited or special contract,—the shipper must have real freedom of choice in deciding which rate he will pay and, consequently, which liability will be imposed. If the carrier declines to accept the goods for transportation because the shipper refuses to enter into a special limited contract, and the shipper in order to procure the carrier to transport his goods signs such a contract under protest, he will not, in case of damage or injury to the goods, be bound by its terms. Railroad Co. *v.* Mason, 4 Kan. App. 391, 46 Pac. Rep. 31.

27. Railroad Co. *v.* Manchester Mills, 88 Tenn. 653, 14 S. W. Rep. 314; Railway Co. *v.* Stone & Haslett, 112 Tenn. 348, 79 S. W. Rep. 1021; Deming *v.* Merchants Cotton Press & Storage Co., *supra*. If the shipper desires to ship under the common law liability, he should object to the terms of the bill of lading when tendered to him by the carrier. Arthur *v.* The Railway, 139 Fed. 127, —— C. C. A. ——.

The shipper should, if he desires to ship his goods under the common-law liability, demand that they be accepted for shipment subject to such liability. It will always be competent for the carrier to show that he was willing and ready to execute another contract upon terms reasonable to the shipper, if he preferred it, in which no limitations of liability

the carrier's liability would not bind him to its terms.[28] The law, as we have seen, charges the carrier with the duty of accepting for transportation all goods of the kind he professes to carry and makes him a practical insurer of their safety while in his custody. The owner, therefore, may rightfully demand that they shall be received and carried under the carrier's liability as an insurer; and a contract limiting such liability to which he is obliged to assent in order to secure transportation cannot be considered as having been freely and fairly entered into and will be of no effect in relieving the carrier from the duties and obligations which the law imposes upon him.

Sec. 405. (§ 237c.) Same subject—Limitation prohibited in some states.—In some of the states, however, it has been deemed contrary to the true policy of the state to permit the carrier to limit his common-law liability by any contract whatever. Prohibition of such contracts has been declared by statute in Kansas,[29] Iowa[30] and Texas,[31] while in Nebraska[32] and Kentucky,[33] they are forbidden by the constitution.

were required as a prerequisite to the shipment; and it will not be necessary for him to specifically tender such contract, since the readiness to make it is sufficient. Railway *v.* Stone & Haslett *supra.*

28. Railway Co. *v.* Cravens, *supra.*

29. Railroad Companies under the statutes of Kansas are prohibited from changing or limiting their common-law liability except by regulation or order of the board of railroad commissioners. It was held under this provision that a stipulation in a contract for the shipment of live stock limiting the amount for which the railroad company should be liable in case of loss or injury, which was made without the permission or order of the board of railroad commissioners, was invalid. Railway Co. *v.* Sherlock, 59 Kan. 23, 51 Pac. Rep. 899. See also, Railway Co. *v.* Tribbey, 6 Kan. App. 467, 50 Pac. Rep. 458.

30. Iowa Code, § 2074, provides that no contract made with a railway company shall operate to exempt it from the liability of a common carrier which would exist had no contract been made. It was held that false and fraudulent representations made by a shipper as to the value of the property shipped, in order to obtain a cheaper rate, would not give vitality to a stipulation in the shipping contract limiting the carrier's liability; that in case of loss under such circumstances, the carrier would be liable for the full value of the article shipped, its remedy being against the shipper for the difference between the rate

Sec. 406. (§ 238.) Mere notice is not sufficient—What constitutes special contract.—But while the cases admit the power of the carrier to qualify his risk by special contract, it is at the same time denied that he can do so by a mere notice to the bailor,[34] or by anything less than a special or express contract. It therefore becomes important to determine what is to be understood by the term special contract in the meaning of these cases, and what is required to be done between the carrier and his employer to create such a special or express contract as the law requires. According to all the English cases on the subject of limitation of liability by notice, a contract sprung from a knowledge of the notice. The theory upon which they all stand is that, if a party, knowing his published terms, employs the carrier without objection, a contract according to those terms is implied between the employed and the employer. And as between parties who are not carriers and other persons who deal with them, there can be no question but that this is the law, upon the most obvious principles. But, as has been said, such notice with knowledge of it does not constitute a contract, but is merely evidence from which a jury is bound to imply one as

charged and the regular rate. Lucas *v.* Railway Co., 112 Iowa, 594, 84 N. W. Rep. 673.

31. Common carriers of goods, wares and merchandise for hire, within the body of the state, are prohibited from limiting their common-law liability. See British Ins. Co. *v.* Railway Co., 63 Tex. 475; Houston, etc., Railroad Co. *v.* Burke, 55 Tex. 323; Gulf, etc., R'y Co. *v.* Booton, (Tex. Civ. Supp.), 15 S. W. Rep. 909. The statute is held to have no application to an interstate shipment. See Railway Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. Rep. 455, 17 L. R. A. 643; Railway Co. *v.* China Mfg. Co., 79 Tex. 28, 14 S. W. Rep. 785; Missouri, etc. Ry. Co. *v.* Ins. Co., 84 Tex. 149, 19 S. W. Rep. 459; Railway Co. *v.* Richmond, 94 Tex. 571, 63 S. W. Rep. 619, *reversing* (Tex. Civ. App.) 61 S. W. Rep. 410.

32. Missouri Pac. R'y Co. *v.* Vandeventer, 26 Neb. 222; Railroad Co. *v.* Palmer, 38 Neb. 463, 56 N. W. Rep. 957, 22 L. R. A. 335; Railroad Co. *v.* Kennard Glass & Paint Co., 59 Neb. 435, 81 N. W. Rep. 372.

33. See The City of Clarksville, 94 Fed. 201, and Barnes *v.* Railroad Co., 93 N. Y. Supp. 616, where the provision of the Kentucky constitution was involved.

34. Georgia, etc. R. Co. *v.* Gann, 68 Ga. 350; Brown *v.* Express Co., 15 W. Va. 812; Williams *v.* The Railroad, 88 N. Y. Supp. 434, 93 App. Div. 582.

effectual as if it had been expressed.[35] An express contract cannot, therefore, spring from a notice unless something be done by the party to be affected by it to make it binding upon him. If, however, there be an express assent to the notice it would be equivalent to an express contract. And this is the sense in which the words are to be taken when it is said that the contract, to avail the carrier, must be special; and the bailor or shipper is considered as assenting to the terms of the notice when he takes a bill of lading or receipt for his goods embodying the notice, which makes it a special contract between himself and the carrier.[36]

Sec. 407. (§ 239.) Same subject.—The same words are used in the English Carriers' Act, which, while it declares, as we have seen, all public notices by carriers ineffectual to limit their liability, provides that nothing therein contained shall affect special contracts for that purpose. Since its passage, many cases have occurred which give us examples of what are considered special contracts with carriers by the English courts. It seems from them that the universal custom of land carriers since that act has been to deliver to the employer a ticket or printed notice in which are stated the conditions upon which the carrying is to be done, and which, when received by him, constitutes the special contract. This, in their view, makes a contract in which the parties are named and the terms agreed upon between them, and that without resorting to anything like a public notice, which satisfies the requirements of the act and avoids the evils against which it was intended to provide.[37] In-

35. Crouch *v.* Railway Co., 2 C. & K. 789.

36. When the shipper fills out blank receipts at his own office, and in accordance with such practice fills out a receipt and presents it to an employe of an express company for his signature when he delivers his merchandise for transportation, its terms constitute a proposal on the part of the shipper for a special contract; and when the agent has assented to such proposal by signing and redelivering it to the shipper, the proposal ripens into a special contract, and, as such, it becomes binding upon both parties. Bernstein *v.* Weir, 40 Misc. Rep. 635, 83 N. Y. Supp. 48.

37. Palmer *v.* Railway Co., 4 M. & W. 749; Chippendale *v.* Railway

deed it is difficult to see how a contract could be made more special.

Sec. 408. (§ 240.) The acceptance of the carrier's receipt creates a contract according to its terms between him and the shipper—Failure to read no defense if no fraud practiced.—As in England, the land carriage of this country is nearly engrossed by railways, canals and express companies, and the usage as to their manner of contracting with their employers is in effect the same. When goods are delivered to them receipts are usually given in which are stated the terms as to the liability of the carrier on which they are to be carried, which are treated in all respects as to their legal effect as bills of lading;[38] and it was never doubted that the bill of lading of the carrier by water was not only the receipt of the carrier for the goods, but an express contract between him and the shipper as to every exception of liability in it. And no reason is perceived why a different legal effect should be given to the latter merely because they relate to carriage by water, unless it be upon the ground of the antiquity of their use for that purpose. Hence most of the American cases above cited, while denying the right of the carrier to protect himself by public or general notices, even when brought home to the knowledge of the bailor, have treated such receipts as creating contracts sufficiently special for that purpose, without inquiring whether they had been read or explained to, or understood or expressly assented to, by the shipper or bailor or not, provided the carrier has resorted to no unfair means of deception, and the employer has had the opportunity to know the contents of such receipt if he had so desired.[39] And this is in accordance with

Co., 7 Eng. L. & E. 395; Morville *v.* Railway Co., 10 *id.* 366; Austin *v.* Railway Co., 10 C. B. 454.

38. Downs *v.* Perrin, 16 N. Y. 325; Downs *v.* Green, 24 N. Y. 638; *ante*, § 127.

39. Kirkland *v.* Dinsmore, 62 N. Y. 171; Louisville, etc. R. R. Co. *v.* Brownlee, 14 Bush, 590; Morrison *v.* Construction Co., 44 Wis. 405; Black *v.* Railway Co., 111 Ill. 351; Jones *v.* Railroad Co. 89 Ala. 376; Western Ry. Co. *v.* Harwell, 91 Ala. 340, 8 So. Rep. 649; Patterson *v.* The Railway, 56 Mo. App. 657; *s. c.* 47 Mo. App. 570;

the English decisions.[40] Nor is there anything unreasonable in this. Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be wilfully blind and plead ignorance when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common-law liability he should have said so, and have either declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services and risk.[41]

Sec. 409. (§ 241.) Same subject—Shipper presumed by accepting receipt to have assented to its conditions.—Accordingly, when the owner of the goods accepts a receipt, he is conclusively presumed, in the absence of fraud and imposition, to have assented to all the terms and conditions contained in it,

Railroad Co. *v.* Dill, 48 Kan. 210, 29 Pac. Rep. 148.

That the receipt was not read is immaterial if no fraud or deceit is practiced. Germania F. Ins. Co. *v.* Railroad Co., 72 N. Y. 90.

The fact that the contract of shipment is signed in haste and without being read will not relieve the shipper from its lawful provisions. Hengstler *v.* Railroad Co., 125 Mich. 530, 84 N. W. Rep. 1067. That the contract was not read or explained to the shipper is immaterial if no unfair means were resorted to by the carrier. The burden of proof is on the shipper to show that unfair means were resorted to in securing the contract. Railroad Co. *v.* Dill, *supra*, citing Hutchinson on Carr.

In Hadd *v.* Express Co., 52 Vt. 335, the shipper could not read, and the agent undertook to read the receipt to him. He omitted to read a clause limiting the liability of the carrier to its own line. *Held*, no fraud, as this would be the legal result if the clause had not been inserted.

40. Y., N. & B. Railway *v.* Crisp, 25 Eng. L. & E. 396; Palmer *v.* Railway Co., 4 M. & W. 749; Stewart *v.* The Railway Co., 3 H. & C. 135; Zunz *v.* The Railway Co., L. R. 4 Q. B. 539; Acton *v.* Castle Mail Packets Co., 73 Law T. (1895) 158; Dean *v.* Furness (Canada), 9 Rap. Jud. Que. B. R. 81.

41. *United States:* Evansville, etc. R. R. *v.* Androscoggin Mills,

and this amounts to a contract with the carrier, which, whether called a special or express contract or a special acceptance, becomes at once binding upon both parties. This has been either tacitly or expressly assumed in most of the cases as the indisputable effect of such an acceptance; and in the two leading

22 Wall. 594; Cau *v.* Railway Co., 194 U. S. 427; Van Shaack *v.* N. T. Co., 3 Biss. 394; Bank of Kentucky *v.* Express Co., 93 U. S. 174; Arthur *v.* Railway Co., 139 Fed. 127, citing Hutchinson on Carr.

Alabama: Steele *v.* Townsend, 37 Ala. 247; Louisville, etc. R. R. *v.* Meyer, 78 Ala. 597.

Florida: Atlantic, etc. R. Co. *v.* Dexter, —— Fla. ——, 39 So. Rep. 634.

Georgia: The carrier is prohibited by statute from limiting his liability by any notice given or by entry on receipts. He can do so only by an express contract. Ga. Civ. Code, §§ 2264, 2276. See Central, etc. R'y Co. *v.* Hall, —— Ga. ——, 52 S. E. Rep. 679.

Indian Territory: Patrick *v.* Railway Co., —— Ind. Terr. ——, 88 S. W. Rep. 330, reversed on another point in Railway Co. *v.* Patrick, —— C. C. A. ——, 144 Fed. 632.

Indiana: Stewart *v.* Railway Co., 21 Ind. App. 218, 52 N. E. Rep. 89; Railway Co. *v.* Nicholai, 4 Ind. App. 119, 30 N. E. Rep. 424, 51 Am. St. Rep. 206, citing Hutchinson on Carr. Adams Ex. Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. Rep. 245; *s. c.* 64 N. E. Rep. 647, 94 Am. St. Rep. 279, citing Hutchinson on Carr.

Iowa: Mulligan *v.* Railroad Co., 36 Iowa, 181; Robinson *v.* Merchants D. T. Co., 45 Iowa, 470.

Kansas: Kallman *v.* Express Co., 3 Kan. 205.

Kentucky: Louisville, etc. R. Co. *v.* Brownlee, 14 Bush. 590.

Massachusetts: Squire *v.* The Railroad, 98 Mass. 239; Grace *v.* Adams Ex. Co., 100 Mass. 505; Hoadley *v.* Trans. Co., 115 Mass. 304; Cox *v.* The Railroad, 170 Mass. 129, 49 N. E. Rep. 97, citing Hutchinson on Carr.

Michigan: McMillan *v.* The Railroad, 16 Mich. 112; Smith *v.* Ex. Co., 108 Mich. 572, 66 N. W. Rep. 479.

Missouri: Patterson *v.* The Railway, 56 Mo. App. 657; *s. c.* 47 Mo. App. 570; Snider *v.* The Adams Ex. Co., 63 Mo. 376; Wyrick *v.* The Railway, 71 Mo. App. 406.

New Hampshire: Merrill *v.* Express Co., 62 N. Hamp. 514.

New York: Belger *v.* Dinsmore, 51 N. Y. 166; Kirkland *v.* Dinsmore, 62 N. Y. 171; Huntingdon *v.* Dinsmore, 4 Hun, 66; Maghee *v.* The Railroad, 45 N. Y. 514; Long *v.* The Railroad, 50 N. Y. 76; Hinckley *v.* The Railroad, 3 N. Y. 281; Steers *v.* The Steamship Co., 57 N. Y. 1; Mills *v.* Weir, 81 N. Y. Supp. 801, 82 App. Div. 396; Wilson *v.* Platt, 84 N. Y. Supp. 143; Hoffman *v.* Express Co., 97 N. Y. Supp. 838.

Pennsylvania: Farnham *v.* The Railroad, 55 Penn. St. 53.

South Carolina: Swindler *v.* Hilliard, 2 Rich. 286.

cases of Belger *v.* Dinsmore,[42] and Kirkland *v.* Dinsmore,[43] it being denied by the plaintiff that this was the effect of the acceptance of the receipt, and the contention being made for him that the conditions thus incorporated in it amounted to nothing more than a mere notice, the position was expressly decided to be untenable, and it was held that by such acceptance he had estopped himself from saying that a contract had not been made between himself and the carrier according to the terms of the receipt.[44]

Sec. 410. Same subject—Cases holding mere acceptance insufficient—Rule in Illinois.—It is held, however, in some of the

Tennessee: Dillard *v.* Railroad Co., 2 Lea, 288; Railway *v.* Stone & Haslett, 112 Tenn. 348, 79 S. W. Rep. 1031, 105 Am. St. Rep. 955.

Vermont: King *v.* Woodbridge, 34 Vt. 565; Davis *v.* The Railroad, 66 Vt. 290, 29 Atl. Rep. 313, 44 Am. St. Rep. 852.

Wisconsin: Boorman *v.* The Am. Ex. Co., 21 Wis. 154; Schaller *v.* The Railway, 97 Wis. 31, 71 N. W. Rep. 1042.

42. 51 N. Y. 166.

43. 62 N. Y. 171.

44. Cau *v.* Railway, 194 U. S. 427, 24 Sup. Ct. R. 663, 48 L. Ed. 1053. See also cases cited in preceding section.

From the delivery and acceptance of a bill of lading at the time goods are delivered to a carrier for shipment, the presumption arises that the shipper assents to its terms, and mere ignorance of its contents, arising from failure to read it, or to make some reasonable effort to obtain information in that regard, in the absence of any evidence of fraud on the part of the carrier, or of the use of any other means to deter the shipper from fully understanding the contract, is not sufficient to overcome the presumption thus raised. While the carrier in the making of such a contract must act in the utmost good faith and with the utmost fairness, if, in the regular course of business, he delivers to the shipper a contract upon the latter's delivery of the goods for shipment, without any circumstances of concealment, nothing further on the carrier's part is required. In the absence of any request for an explanation, the carrier owes no duty to the shipper to make such explanation and the latter cannot successfully allege ignorance of the contract merely because he negligently fails to inform himself of its provisions. The familiar rule applies that if a person makes a written contract with another, he takes upon himself the responsibility of acting intelligently and exercising ordinary care to inform himself of its provisions. Failure to read the contract or to examine it, or, in case of inability to do so without assistance, to obtain such assistance if reasonably within reach, is negligence as a matter

cases that the mere acceptance by the owner of the goods of a receipt in which are inserted terms or conditions intended to alter or modify the carrier's common-law liability is insufficient to constitute a contract between him and the carrier according to such terms or conditions. In order that the owner may be concluded by the limitations contained in the receipt, it must further appear, so it is said, that he assented to its conditions or restrictions when he accepted it from the carrier, and that whether there was such an assent on his part must be determined by the jury on evidence *aliunde* and from all the circumstances attending the acceptance; the burden of proof being on the carrier to show that such conditions were so assented to by the owner of the goods.[1] The courts of Illinois have repeatedly

of law. In view of the way business has been conducted by transportation companies for a long period of time as a matter of common knowledge, there is no reason why contracts between such companies and their customers should be excepted from the foregoing rule. Schaller *v.* Railway, 97 Wis. 31, 71 N. W. Rep. 1042.

The subject was also considerably discussed by Cooley, J., in McMillan *v.* The Railway Co., 16 Mich. 112, in favor of the position that if the consignor of goods receive a bill of lading or receipt from the carrier containing limitations of the latter's liability without making any objection thereto, and has not been misled or imposed upon, he cannot deprive the carrier of the benefit of such limitations by showing that he took the bill of lading or receipt without reading it and without being aware that it contained them, but that in the absence of fraud the terms of the bill of lading or receipt will be conclusive.

1. This subject was extensively discussed by Johnson, J., in the case of Gaines *v.* The Union Transportation Co. in the supreme court commission of Ohio, 28 Ohio St. 418, and the settled law of that state was said by him to be as follows:

"1. That a special exception of the liability of a common carrier of goods for any loss which may arise from damage by fire happening without his neglect or fault may be lawfully created by special contract between the parties, though it cannot be made by general notice known or unknown to the party engaging the services of the common carrier. Davidson *v.* Graham, 2 Ohio St. 131; Graham & Co. *v.* Davis & Co., 4 *id.* 362; Welsh *v.* Pittsburg, Ft. W. & C. R. R. 10 *id.* 65; C. H. & D. R. R. Co. *v.* Pontius, 19 *id.* 221.

"2. That while a common carrier by special contract with the owner of the goods intrusted to him may so far restrict his common-law liability as to exonerate himself

adhered to this view and it may be stated as the settled law in that state.[2]

Sec. 411. (§ 242.) Form and nature of the contract—Need not be in writing—Evidence to establish.—In the absence of a

from losses arising from causes over which he had no control, and to which his own fault or negligence in no way contributed, he cannot by such stipulation relieve himself from responsibility for losses caused by his own negligence or want of care or skill, and the burden of proof is upon the carrier to show not only a loss within the terms of the exception, but also that proper care and skill were exercised to prevent it. Graham & Co. *v.* Davis & Co., 4 Ohio St. 362.

"3. A bill of lading signed by the company's receiving agent and *accepted* and *acquiesced in* by the consignor is binding upon the latter although not signed by him, and the terms and conditions of the contract expressed therein cannot be contradicted by parol proof. C., H. & D. R. R. Co. *v.* Pontius & Richmond, 19 Ohio St. 222.

"4. That where a common carrier, who has received and undertaken to carry the goods of another, seeks, in an action against him, to limit his common-law liability as such, the burden is on him not only to establish the special agreement limiting the liability, but also to show that the loss falls within the terms of such agreement. Graham *v.* Davis, 4 Ohio St. 362; The Union Ex. Co. *v.* Graham, 26 *id.* 595; The United States Ex. Co. *v.* Backman, 28 *id.* 144." . . . "Without reviewing at large," said the learned judge, "the numerous and somewhat conflicting cases on this point, it is enough to say that the principle adopted in Ohio and steadily adhered to, that the common-law liability of the carrier can be limited by a special agreement only, is supported both by reason and authority. That there should be an *express assent* to limitations of a carrier's liability is decided in the following cases: Adams Ex. Co. *v.* Nock, 2 Duvall, 563; Express Co. *v.* Moon, 39 Miss. 832; Levering *v.* Union Trans. Co., 42 Mo. 88; Adams Ex. Co. *v.* Haynes, 42 Ill. 89; Adams Ex. Co. *v.* Stettaners, 61 *id.* 186; Railroad Co. *v.* Manufacturing Co., 16 Wall. 329, and numerous other cases."

The mere acceptance by the shipper of a bill of lading in which the liability of the carrier, in the event of loss, is limited to five dollars per one hundred pounds, the true value being much more, will not bind the shipper to its terms. In order to so bind him, the evidence must show that he assented or agreed to its terms. St. Louis, etc. Railway Co. *v.* McIntyre, (Tex. Civ. App.), 82 S. W. Rep. 346.

2. Adams Ex. Co. *v.* Haynes, 42 Ill. 89; Adams Ex. Co. *v.* Stettaners, 61 *id.* 184; Anchor Line *v.* Dater, 68 *id.* 369; Ill. Cent. R. R. *v.* Frankenberg, 54 *id.* 88; Field *v.* Railroad, 71 *id.* 458; U. S. Express Co. *v.* Haines, 67 *id.* 137; Merchants' Dis. Co. *v.* Ley-

statute to the contrary no particular form or mode is required to constitute such a contract as will be binding upon the carrier's employers. The courts have gone no further in this regard than to hold that no such contract can spring from a general or public notice, even when it is most explicitly shown that the owner of the goods had notice of it; and to this extent they have uniformly and persistently adhered to the doctrine of Hollister *v.* Nowlan and Cole *v.* Goodwin. And it is equally well settled that a private notice, though given directly to the owner, cannot be made to bind him as a contract, unless something is done by him, besides the delivery of his goods to the carrier, to show his agreement to the terms of such notice. Whenever, however, it appears that what has been proposed on one side has been accepted by the other, a contract is proven which will be mutually binding, whether the proposition is made in the form of notice or in any other manner. But the proof of assent to the terms proposed by the carrier must be clear in such a case; for the law having imposed an important duty upon him upon grounds of public policy, will not permit him to divest himself of its responsibilities and throw the loss upon his employer, when the proof that the latter has so agreed is doubtful. But it is not required that such proof, if otherwise satisfactory, shall be written. A verbal contract is as obligatory as a written one when established. The only

sor, 89 Ill. 43; Merchants' Dis. Co. *v.* Joesting, 89 Ill. 152; Railroad Co. *v.* Fox, 113 Ill. App. 180; Express Co. *v.* Bratton, 106 Ill. App. 563; Railroad Co. *v.* Harris, 55 Ill. App. 159; Coles *v.* Railroad Co., 41 Ill. App. 607; Railroad Co. *v.* Davis, 159 Ill. 53, 42 N. E. Rep. 382, 50 Am. St. Rep. 143; Railroad Co. *v.* Simon, 160 Ill. 648, 43 N. E. Rep. 596, *affirming* 57 Ill. App. 502; Chicago, etc. R'y Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. Rep. 1095, 88 Am. St. Rep. 68, *affirming* 96 Ill. App. 337. But see Anchor Line *v.* Knowles, 66 Ill. 150, in which it was held that if the receipt contain a provision that the carrier should not be liable for loss by fire or other casualty, and no question was made as to the shipper's knowledge of its contents, it must be inferred that he had such knowledge at the time of the shipment, and agreed to its terms.

difference is in the manner and in the degree of certainty of the proof.[3]

Sec. 412. (§ 243.) Same subject—Parol modifications—Signing by one party—Effect of carrier's omission to sign.—As we have seen,[4] however, all verbal agreements entered into previous to the acceptance of the bill of lading or receipt are considered as merged in the latter, and no evidence will be admissible to vary or contradict or to modify its terms by such previous instructions or contracts. But it has been held to be competent for the parties to show subsequent modifications or changes of the written contract by the enlargement of the time of performance or to vary it in any of its terms; or, if founded upon a new consideration, to waive and discharge it altogether.[5] Nor, if the evidence of the contract is in writing, is it, in the absence of a statute to that effect, required to be signed by both par-

3. Missouri, etc. Ry. Co. *v.* Patrick, —— C. C. A. ——, 144 Fed. 632, citing Hutchinson on Carr; *reversing* Patrick *v.* Railway Co., —— Ind. Terr. ——, 88 S. W. Rep. 330; Roberts *v.* Riley, 15 La. An. 103; Ill. Cent. R. R. Co. *v.* Morrison, 19 Ill. 136; Gould *v.* Hill, 2 Hill, 623; Railway Co. *v.* Nicholai, 4 Ind. App. 119, 30 N. E. Rep. 424, 51 Am. St. Rep. 206, citing Hutchinson on Carr.

"While it is true," says Campbell, J., "that it devolves upon a carrier to show affirmatively the terms of any contract which lessens his common-law liability, yet that fact is to be proven like any other, by any pertinent evidence. If in writing, the writing must be shown; but if by parol, there is no rule which requires different proof from that which would establish any other contract. It does not matter that the evidence is conflicting, for in civil cases the jury must always decide upon the weight of the evidence; and there is no rule (except where turpitude or illegality is in issue) which requires one contract to be proven by more or different testimony than another. The jury, in each case, must be satisfied that a certain contract exists; and if satisfied, that is sufficient." American Transp. Co. *v.* Moore, 5 Mich. 368.

A bill of lading, unsigned by the carrier's agent but furnished the shipper on his request, while not constituting a written contract, is evidence of the contract actually made. Missouri, etc. Ry. Co. *v.* Patrick, *supra.*

4. *Ante*, §§ 167-171.

5. The Delaware, 14 Wall. 603. But where the contract of shipment does not provide for a limitation of liability, it will not be competent by proof of a custom to vary the contract in such respect. McMillan *v.* Express Co., 123 Iowa, 236, 98 N. W. Rep. 629.

ties. Bills of lading and receipts given by carriers are always signed by them, because, as we have seen, they are not only acknowledgments of the receipt of the goods, but are contracts to carry; and, as such receipts and contracts, they should always be required by the shipper. If, however, they contain the terms and conditions upon which the goods are received to be carried, they are, when signed by the carrier, conclusive as evidence that he has assented to them; and when accepted by the shipper, such terms and conditions, according, at least, to the weight of authority, become also his contract as conclusively as if he had also signed such receipt.[6]

Sec. 413. (§ 243a.) Same subject—Statutory requirements.—In many of the states, however, statutes have been enacted regulating the form in which contracts limiting the carrier's liability shall be made. Thus, it is frequently provided that the contract shall not be valid unless *signed* by both parties, and, less frequently, unless the contract shall be wholly in *writing* and signed by both parties. These statutes have for their purpose not only to secure tangible evidence of the shipper's consent without relying upon the uncertainties of parol evidence, but also to secure the shipper against the imposition or mistake which is possible to result from the use of printed forms prepared by one party.

Statutes of this nature are lawful and must be observed.[7]

Sec. 414. (§ 244.) Notices not intended to limit liability.—But while the power of the carrier to limit his liability by what are called public or general notices or by private notice without some act on the part of his employer to show his agreement to be bound by it, which would give rise to a contract according to its terms, is universally denied in this country, it does not follow that there may not be cases in which he may claim protection from such notices when they are known to those who send their goods by him.[8] A distinction is to be

6. *Ante*, § 407.

7. See Feige *v.* Railroad Co., 62 Mich. 1.

8. See *post*, §§ 437-438.

drawn between such notices as can be strictly said to limit his liability by relieving him from the strict common-law liability for losses against which carriers are understood to be insurers, and notices which warn the public that his business is confined to the carriage of only a particular class of goods, or within the limits of his own route, or to those not above a specified value, without a compliance on the part of those who employ him with certain conditions. Such notices as these last are not to be considered so much in the light of notices to restrict his liability as in the nature of means to prevent fraud and imposition upon him; and when they are reasonable and fairly resorted to, no reason is to be found in law, morals or in public policy why they should not be allowed to protect him against imposition. If, for instance, the carrier should give notice that he would not carry money or jewels, or that he would not carry parcels above a certain value, or be responsible for them unless their value was declared and compensation paid for the carriage accordingly, the law would not make him liable for their value in case of loss if they were given to him to carry by one who was cognizant of his notice, without informing him of their nature or value, of which he was ignorant. And any rule or custom of his business of that character, known to his employer, would impose the same obligation upon the latter to make known the nature or value of the goods, and would have the same effect in protecting the carrier from deceit and imposition. And in such cases it is not obligatory upon the carrier to inquire as to the character or value of the goods, but it is the duty of the owner to inform him; otherwise he is guilty of a deception, and if the goods are lost, he would be estopped from demanding compensation. "If he has given general notice," says Nelson, J., in Orange County Bank *v.* Brown,[9] "that he will not be liable over a certain amount unless the value is made known to him at the time of delivery and a premium for insurance paid, such notice, if brought home to the knowledge of the owner, is as effectual in qualifying the acceptance of the

9. 9 Wend. 115.

goods as a special agreement, and the owner, at his peril, must disclose the value and pay the premium. The carrier in such case is not bound to make the inquiry, and if the owner omits to make known the value and does not therefore pay the premium at the time of delivery, it is considered as dealing unfairly with the carrier, and he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice."[10]

Sec. 415. Terms of limitation must be embodied in the contract—Must be plain and easily legible.—The mere acceptance of the carrier's receipt, however, will not operate to bind the sender of the goods to its terms of limitation unless such terms are written or printed upon the receipt as a part of the contract embodied in it and are so plainly legible that they cannot reasonably be overlooked. And it has been held that if the terms of limitation be written or printed upon the back of the receipt, no presumption will arise that they were known to the party accepting it, and that they will be no evidence in the carrier's favor of a special contract.[11] So it has been held that the fact

10. F. & M. Bank *v.* Champlain T. Co., 23 Vt. 186; Moses *v.* Boston, etc. R. R., 4 Foster, 71; 2 Greenl. on Ev. § 215.

11. Michigan Cent. R. R. *v.* Mineral Springs Mfg. Co., 16 Wall. (83 U. S.) 318; Ayres *v.* The Railroad, 14 Blatch. 9, Fed. Cas. No. 689; Doyle *v.* The Railroad, 126 Fed. 841; Railroad Co. *v.* Hale, 6 Mich. 244; Newell *v.* Smith, 49 Vt. 255; Prentice *v.* Decker, 49 Barb. 21; Merchants, etc. Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. Rep. 624, 41 Am. St. Rep. 265; Transportation Co. *v.* Newhall, 24 Ill. 466; Belger *v.* Dinsmore, 34 How. Pr. 421; Railway Co. *v.* Tribbey, 6 Kan. App. 467, 50 Pac. Rep. 458. Knowledge of limitations on the back of the receipt will never be imputed to the shipper unless the evidence shows to a moral certainty that they could not have escaped his attention. Baltimore, etc. R. Co. *v.* Doyle, 142 Fed. 669.

See also, Brown *v.* The Railroad, 11 Cush. 97; Malone *v.* The Railroad, 12 Gray, 388; Limburger *v.* Westcott, 49 Barb. 283; McMillan *v.* The Railroad, 16 Mich. 79; Brittan *v.* Barnaby, 21 How. 527; Verner *v.* Sweitzer, 32 Penn. St. 208; Am. note to Coggs *v.* Bernard, 1 Smith's leading cases, 7th Am. Ed.; Colwin *v.* Fargo, 94 N. Y. Supp. 377.

A contract for the shipment of horses, and a contract on the back for the transportation of a man to accompany them, each contract being separately signed, are sepa-

that terms of limitation printed upon the back of the receipt are referred to upon its face will give rise to no presumption that they were known to the sender of the goods when he accepted the receipt.[12] In general, therefore, it may be stated that whenever conditions intended to limit the carrier's liability are written or printed upon the receipt, but not as a part of the contract embodied in it, they will be considered as notices only, and as such not binding on the sender of the goods unless his assent to them has been secured. So if any attempt at imposition or deception appears, or any device be resorted to to mislead him or to keep from his notice any of the written or printed indorsements upon the receipt, which are intended to affect such liability, they will not avail the carrier if they have been overlooked. In order that such conditions may inure in any degree to his exoneration, the law exacts the utmost fairness on his part, and that full opportunity shall be given to the owner of the goods for information as to the terms thus proposed. In Blossom *v.* Dodd,[13] a railroad passenger in a car dimly lighted delivered his baggage checks to an express messenger and received in return a receipt on which the num-

rate contracts, and an agreement on the back of the latter that it shall be governed by the laws of a certain state cannot be read into or affect the interpretation of the contract for the shipment of the horses. Brockway *v.* Express Co., 171 Mass. 158, 50 N. E. Rep. 626; *s. c.* 168 Mass. 257, 47 N. E. Rep. 87.

12. Michigan Cent. R. R. *v.* Mineral Springs Mfg. Co., *supra;* Ayres *v.* The Railroad, *supra.*

A clause limiting the liability of the carrier which is impressed in red ink upon one corner of the paper upon which the freight receipt is printed in black ink, and which is at right angles to the text of the paper, is no part of the contract unless brought to the knowledge of the shipper in such a way as to imply his assent thereto when he accepted the receipt. Railroad Co. *v.* Sayles, 87 Fed. 444, 32 C. C. A. 485.

13. 43 N. Y. 264.

In Perry *v.* Thompson, 98 Mass. 249, the owner of goods, on delivering them to the carrier, accepted a receipt which contained a printed clause limiting the carrier's liability. A revenue stamp was affixed to the receipt in such a way that the limitation could not be intelligibly read. It was held that there was no contract according to the terms of the limitation.

ber of the check was entered, and which also contained an agreement limiting the liability of the express company, printed in much smaller type than the rest of the card, and so fine as to be illegible where the passenger was sitting, and it was held that this printed matter did not enter into or form a contract between the parties and could not be claimed as a limitation upon its liability by the express company, the court saying that the circumstances under which the paper was received repel the idea of a contract, and that whilst the carrier should be protected in his legal right to limit his responsibility, the public should also be protected against imposition and fraud; and that if he desires to limit his liability he must deal with the public upon terms of equality and secure the assent of those with whom he transacts business.[14] But, as we have seen,[15] if there be no

14. In Madan *v.* Sherard, 73 N. Y. 329, defendant's agent came into a railroad car in which plaintiff was traveling and called for baggage; received the plaintiff's check for his trunk and directions for its delivery; made an entry in pencil in his tally book; marked on the receipt the date, the number of check and place of delivery; handed the receipt to plaintiff, and immediately passed on, nothing further being said. Plaintiff, without reading the receipt, put it in his pocket. The car was dimly lighted, and plaintiff could not have read the receipt where he was sitting. The receipt purported to be a contract between plaintiff and defendant for the carriage of the baggage. It contained several hundred printed words, and acknowledged the receipt of the trunk, "subject to this bill of lading," which, in the margin was designated, "domestic bill of lading." Then followed a restriction of defendant's liability, declaring that he shall not be liable for "merchandise, money, or jewelry, contained in baggage, nor for loss by fire, nor in case of loss or damage or detention by reason of negligence or otherwise, for an amount exceeding $100, upon any trunk, etc., including the contents thereof, unless specially agreed for in writing, and noted hereon, and the extra risk paid therefor." The receipt was in good type, and under ordinary circumstances could have been easily read. The trial judge charged that if plaintiff did not know that the receipt was proffered to him as a contract, "and received it, not knowing its contents, and supposing that it was given simply to enable him to trace his property, or as a mere receipt, then the plaintiff was not bound by its limitations." This was qualified by the statement "that if the paper was handed to the plaintiff under such circumstances that he might have read it, and neglected to do so,

evidence of an attempt on the part of the carrier to mislead or to conceal from his employer the terms of his proposed contract, and there is in fact no want of opportunity on the part of the latter to read the conditions and limitations of liability embodied in the receipt or so plainly indorsed upon it that he could not, without being obnoxious to the charge of negligence, have overlooked them, he cannot avoid their effect as a contract by alleging that he did not read them or did not in fact understand that they were so intended; and no fraud or imposition having been practiced upon him, it must be conclusively presumed that he knew, when he took such receipt in the usual and customary course of business, the stipulations contained in it as to the liability assumed by the carrier, and he would be precluded from denying such knowledge or his assent to them merely because he had negligently omitted to examine the receipt.

Sec. 416. (§ 246.) Receipt, to be effectual in limiting liability, must be given to and accepted by the shipper at the time of the acceptance of the goods.—To make the terms or conditions of the receipt effectual in limiting the liability of the carrier, it must be delivered to the shipper of the goods at the time they are accepted for carriage, unless there is an agreement that it shall be delivered at some future time; for, the carrier having accepted the goods unconditionally, his unlimited liability has become fixed, and he cannot afterwards, without the consent of the owner of the goods, change it to a limited one.[16] And although it be agreed when the goods are accepted for carriage that a bill of lading shall be forwarded to the

he was bound by its contents." Under this instruction the jury found for the plaintiff, and the judgment was not disturbed in the supreme court.

15. *Ante*, § 407.

16. Blossom *v.* Griffin, 13 N. Y. 569; Gaines *v.* The Transportation Co., 28 Ohio St. 418; Pruitt *v.* The Railroad, 62 Mo. 527; Louisville, etc. R. Co. *v.* Meyer, 78 Ala. 597; American Exp. Co. *v.* Spellman, 90 Ill. 455; Michigan Cent. R. Co. *v.* Boyd, 91 Ill. 268; Merchants' Dis. Co. *v.* Cornforth, 3 Colo. 280; Railway Co. *v.* Clark, 48 Kan. 321, 329, 29 Pac. Rep. 312, citing Hutchinson on Carr.

shipper at some future time, he will not be bound by any limitations inserted in it if it appear that no mention was made of them to him and that he in good faith supposed it would be nothing more than an ordinary receipt.[17] But after the bill of lading has been forwarded to the shipper, he may, either expressly or by conduct amounting to a ratification, adopt its limitations, and if they are such as the law considers reasonable, he will be bound by them.[18] So if there has been an habitual course of dealing between the parties for one to deliver the goods and for the other afterwards to make out and deliver bills of lading containing uniform conditions as to liability, the former will be bound to accept them, and such conditions will become the terms of the contract between the parties.[19]

Sec. 417. (§ 247.) Same subject—Parol agreement acted upon cannot be limited by receipt, subsequently delivered.—If, however, there be no such course or habit of dealing between the parties, a receipt or bill of lading delivered after the loss will be of no avail, although the carrier may have intended at the time to give the receipt, but was prevented from so doing by accidental circumstances, there being, however, no consent on the part of the owner of the goods to receive it at some future time.[20] And if the goods be delivered and the transportation commenced under a verbal agreement as to the time, manner or conditions, such verbal agreement is not merged in a bill of lading delivered afterwards to the shipper, when he has parted with all control over them; and the mere receipt of such a bill of lading, after the verbal agreement has been acted, does not estop him from showing what the actual agreement was.[21] Thus, in Bostwick *v.* Railroad,[22] plaintiff had

17. Railroad Co. *v.* Craig, 102 Tenn. 298, 52 S. W. Rep. 164.

18. Rubens *v.* Steamship Co., 65 Hun, 625, 20 N. Y. Supp. 481.

19. Shelton *v.* The Merchants' D. T. Co., 59 N. Y. 258. See also, Railroad Co. *v.* Richardson, 23 Ky. Law Rep. 2234, 66 S. W. Rep. 1035.

20. Gott *v.* Dinsmore, 111 Mass. 45.

21. Missouri Pac. R'y Co. *v.* Beeson, 30 Kans. 298; Swift *v.* Steamship Co., 106 N. Y. 206; Guillaume *v* Transportation Co., 100 N. Y. 491; Wheeler *v.* Railroad Co., 115 U. S. 29; Wilde *v.* Transportation Co., 47 Iowa, 247; Merchants, etc.

made a verbal contract with the agent of the railroad company to transport his cotton by "all rail" from Cincinnati to New York. Under this agreement he delivered his cotton at the company's depot and its transportation was immediately commenced. One or two days afterwards the company's agent sent to the plaintiff a bill of lading which by its terms reserved to the company the right to forward in part by water. When the cotton reached Baltimore it was shipped on steamers for New York and a part of it was lost by the wrecking of the vessel in a storm. It was held that, after the verbal agreement had been consummated and rights had accrued under it, it could not be altered without the express assent of the shipper, and that, the cotton having been exposed to the danger by the fault of the company, it was liable, though the immediate cause of the loss might have been the act of God.[23]

Sec. 418. (§ 248.) Extent to which carrier may limit his liability.—The extent to which the carrier may exonerate him-

Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. Rep. 624, 41 Am. St. Rep. 265; Caldwell *v.* Railway Co., 21 Ky. Law Rep. 397, 51 S. W. Rep. 575; Railroad Co. *v.* Cooper, 21 Ky. Law Rep. 1644, 56 S. W. Rep. 144; Railway Co. *v.* Clark, 48 Kan. 321, 329, 29 Pac. Rep. 312. See, *ante*, § 171.

A passenger's rights and the carrier's liability as to baggage are fixed and determined when his ticket is bought. Subsequent notice of a limitation of liability will not alter the rights thus determined, unless the passenger assents thereto upon a sufficient consideration. Saunders *v.* Railway Co., 128 Fed. 15, 62 C. C. A. 523.

22. 45 N. Y. 712.

23. In Union Pac. R'y Co. *v.* Marston, 30 Neb. 241, 46 N. W. Rep. 485, it appeared that one M. applied to an agent of the Rock Island & Peoria Railroad Company, at one of its stations in the state of Illinois, to ship certain office furniture, including a stove, to Kearney, on the line of defendant's road in the state of Nebraska. The agent informed M. that the custom was for shippers to release stoves, but advised him not to do it for reasons given, but to pay the additional expense of sending it at carrier's risk. To this M. assented, and offered to pay the freight to said agent, who informed him that he could as well pay it at the end of the route. The agent placed the goods in a car of a freight train, which proceeded on its way. Four or five hours afterwards the agent handed M. a paper, saying that it was a receipt for the goods shipped. This paper M. put in his pocket without examining it, and

self from responsibility by such express or special agreements, where permitted, is, subject to the exceptions to be hereafter considered, almost unlimited. He cannot, of course, exonerate himself from the consequences of the fraud or felony either of himself or of his servants, though, as we have seen,[24] it was formerly otherwise in England as to the felony of his servants; and, as will be hereafter seen,[25] according to the weight of authority in this country, based upon considerations of public policy, he cannot contract for exemption from liability for losses caused by his own or the negligence of his servants. But, with these exceptions, there is no danger or risk which can arise in the course of the transportation of the goods, or of his connection with them, for which he cannot avoid responsibility by a contract fairly and understandingly made with his employer, upon the theory that the owner of the goods, for the consideration which it is supposed he receives, either in the reduced compensation or in some equivalent advantage, may surrender, if

it proved to be a bill of lading of the goods, containing, *inter alia*, the condition, "stoves at owner's risk of breakage." The goods were received at Council Bluffs from the Rock Island Railroad by defendant, the Union Pacific Railway Company, and carried to Kearney. Upon arrival the stove was found to have been broken *en route*. In an action by M. against the Union Pacific Railway Company for damages for injury to the stove, it was held that, as between M. and the Rock Island & Peoria Railroad Company, the stove was carried at carrier's risk.

The same rule was followed in American Exp. Co. *v.* Spellman, 90 Ill. 455, where the receipt or bill was given some time after the goods had been shipped, and the evidence negatived expressly any presumption that the shipper knew of it; and in Michigan Cent. R. Co. *v.* Boyd, 91 Ill. 268, where a bill of lading was given a few days after the delivery to the carrier, and while the goods were on their way, this contract or limitation not being assented to by the consignee and owner, and the consignor's authority to bind the consignee as his agent, having expired with the shipment; and in Merchants' Dis. Co. *v.* Cornforth, 3 Colo. 280, where, after a verbal contract for the shipment had been made and the goods were loaded, the receipt was delivered to the consignors, though the question was not of consequence, as the loss was by the carrier's negligence. To like effect, also, is Louisville, etc. R. Co. *v.* Meyer, 78 Ala. 597.

24. See *ante*, § 392.

25. See *post*, § 450.

he will, the obligation of the carrier as an insurer, to any extent he may choose. Thus—

Sec. 419. (§ 248a.) Carrier may stipulate for exemption from liability for certain losses in carriage of live stock.—As has been already seen,[26] the carrier of living animals as freight is, by the weight of authority, to be regarded as a common carrier as to such freight. It has also been seen[27] that the carrier of animals is by law exempt from liability for those losses which are occasioned, not by his fault or neglect, but by the inherent nature, vice or propensity of the animals themselves. The carriage of animals evidently involves different requirements than those involved in the carriage of inanimate objects. They must be loaded and unloaded with more care; they must be fed, watered and protected; they must be secured from escape; they must be guarded against heating, crowding and suffocation; they must often require skilled attention and assistance. For these and like reasons the owner and the carrier may both desire that the owner, or some experienced person in his behalf, shall accompany the stock and assume its care, leaving to the carrier only the duty of transportation with its necessary incidents. In view of these facts, it is well settled that the owner and the carrier may, by contract, provide that the carrier shall be exempt from all liability for injuries occurring to the stock disconnected and apart from the conduct and running of the trains, such as injury from loading or unloading, from overloading, suffocation, heating, and the like, or from the weakness, escape or viciousness of the stock.[28] Such a con-

26. *Ante*, § 339.

27. *Ante*, § 336.

28. Georgia R. R. Co. *v.* Beatie, 66 Ga. 438; Georgia R. R. Co. *v.* Spears, 66 Ga. 485; Mitchell *v.* Railroad Co., 68 Ga. 644; East Tenn. R. Co. *v.* Johnston, 75 Ala. 596; St. Louis, etc. R'y Co. *v.* Lesser, 46 Ark. 236; Myers *v.* Railway Co., 90 Mo. 98; Atchison *v.* Railroad Co., 80 Mo. 213; Ball *v.* Railway Co., 83 Mo. 574; Sturgeon *v.* Railway Co., 65 Mo. 569; Oxley *v.* Railway Co., 65 Mo. 629; Clark *v.* Railway Co., 64 Mo. 440; Levering *v.* Transportation Co., 42 Mo. 88; Pennsylvania R. Co. *v.* Raiordan, 119 Penn. St. 577; Central R. Co. *v.* Bryant, 73 Ga. 722; Betts *v.* Loan & Trust Co., 21 Wis. 80; Morrison *v.* Construction Co., 44 Wis. 405; Burns *v.* Railway Co.,

tract does not relieve the carrier from the due performance of his undertaking; nor can he, according to the weight of authority, by such a contract escape responsibility for the negligence of himself or his servants.[29] The consideration for such contracts is usually found in the reduced rates given and the free transportation of the shipper or his agent to and from the destination of the stock.

Sec. 420. (§ 248b.) Carrier may stipulate for exemption in case of loss by fire.—So a carrier may stipulate for exemption from liability in case the goods are lost or injured by fire, and if he does so, the measure of his obligation is ordinary diligence;[30] but if the fire is caused by his negligence, or if he negligently places or leaves the goods in a place of danger, he cannot, by such a stipulation, escape responsibility.[31]

Sec. 421. (§ 248c.) Carrier may stipulate for exemption in case of loss caused by strikes, mobs, etc.—So it is held that a

104 Wis. 646, 80 N. W. Rep. 927; Railway Co. *v.* Patterson, 69 Ill. App. 438; Railroad Co. *v.* Fox, 113 Ill. App. 180; Morse *v.* Railway Co., 97 Me. 77, 53 Atl. Rep. 874; Railroad Co. *v.* Sherwood, 132 Ind. 129, 31 N. E. Rep. 781, 32 Am. St. Rep. 239, 17 L. R. A. 339; Railroad Co. *v.* Reid, 91 Ga. 377, 17 S. E. Rep. 934; Railroad Co. *v.* Schuldt, 66 Neb. 43, 92 N. W. Rep. 162.

29. See *post*, § 450; Moulton *v.* Railway Co., 31 Minn. 85; Coupland *v.* The Railroad, 61 Conn. 531, 23 Atl. Rep. 870, 15 L. R. A. 534; Candee *v.* The Railroad, 73 Conn. 667, 49 Atl. Rep. 17; Minter *v.* The Railway, 82 Mo. App. 130; Botts *v.* The Railroad, 106 Mo. App. 397, 80 S. W. Rep. 976; Railway Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. Rep. 1106; Railway Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. Rep. 198; Armstrong *v.* Express Co., 159 Penn. St. 640, 28 Atl. Rep. 448.

30. Little Rock, etc. R'y Co. *v.* Daniels, 49 Ark. 352; Rand *v.* Transportation Co., 59 N. H. 363; Louisville, etc. R. Co. *v.* Manchester Mills, 88 Tenn. 653, 14 S. W. Rep. 314; Reid *v.* The Railroad, 10 Ind. App. 385, 35 N. E. Rep. 703, 53 Am. St. Rep. 391; Indianapolis, etc. R'y Co. *v.* Forsythe, 4 Ind. App. 326, 29 N. E. Rep. 1138, citing Hutchinson on Carr.; Constable *v.* Steamship Co., 154 U. S. 51, 14 Sup. Ct. R. 1062, 38 L. Ed. 903; Walters *v.* Railway Co., 1 Terr. L. R. 88.

31. McFadden *v.* Railway Co., 92 Mo. 343; Liverpool, etc. Ins. Co. *v.* McNeill, 89 Fed. 131, 32 C. C. A. 173. See also, *post*, § 477.

carrier may by contract secure immunity from liability for loss caused by mobs, strikes or violence to persons or property.[32]

Sec. 422. (§ 248d.) Carrier may stipulate for exemption in case of loss by thieves or robbers.—So the carrier may, by special contract, secure exemption from liability for losses by thieves or robbers where his own negligence has not given opportunity or occasion for the loss.[33]

Sec. 423. Carrier may stipulate for exemption where goods of a dangerous character are accepted for carriage.—It being optional with the carrier whether he will accept for carriage goods of a dangerous character, he may, it is held, if he chooses to accept them at all, impose such restrictions or limitations upon his common law liability as he sees fit.[34]

Sec. 424. Carrier may stipulate for liability of warehouseman while goods are awaiting further conveyance.—While the carrier, as has been seen, [35] is not permitted to become a warehouseman of the goods, before their arrival at destination, by simply storing them at some intermediate point, he may, by a special contract to that effect, provide that he will be liable as a warehouseman only in case the goods are delayed while awaiting further conveyance by another carrier, and such provision will be enforced. Thus where the carrier's bill of lading provided that no carrier in the route should be liable in any other respect than as a warehouseman while the goods shipped under it were awaiting further conveyance, and while awaiting delivery to a connecting carrier the warehouse in which they were stored was destroyed by fire without fault on the part of the carrier, it was held that the limitation was valid and that the goods having been destroyed while awaiting further conveyance within the clause of the bill of lading, the carrier was not liable.[36]

32. Gulf, etc., Ry. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. Rep. 913.

33. The Saratoga, 20 Fed. 869.

34. California Powder Works *v.* The Railroad, 113 Cal. 329, 45 Pac. Rep. 691, 36 L. R. A. 648.

35. See *ante*, § 141.

36. Courteen *v.* Kanawha Dispatch, 110 Wis. 610, 86 N. W. Rep. 176, 55 L. R. A. 182.

Sec. 425. Contracts limiting the amount of damages recoverable.—Conditions are frequently to be found in carrier's receipts to the effect that in case of loss the carrier will be liable only to the extent of a certain sum. If the sum thus named is fixed without any regard to the real value of the goods, the limitation will be considered as an attempt by the carrier to secure a partial exemption from liability, and, in so far as its validity is concerned, it will stand on the same footing as any other condition intended to secure immunity from the consequences of negligence. By the great weight of authority, as we shall see,[37] the carrier is not permitted to relieve himself by contract from liability for losses occasioned by his negligence. If, therefore, a loss occurs which is attributable to the carrier's negligence, a condition by which it is attempted to fix the amount recoverable at a certain sum, irrespective of the real value of the goods, cannot avail the carrier, and the owner may recover to the full extent of his actual loss.[38] But if the loss or injury result from causes for which the carrier is in no manner responsible, a contract founded upon an adequate consideration limiting the amount recoverable to a designated sum will be valid and conclusive between the parties, and the owner will be limited in his recovery to the sum named.[39]

37. See *post*, § 450.

38. Everett §. Railroad Co., 138 N. Car. 68, 1 L. R. A. (N. S.) 985; Southern Ex. Co. *v.* Marks, etc. Co., —— Miss. ——, 40 So. Rep. 65; Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017; Black *v.* Transportation Co., 55 Wis. 319; Southern Exp. Co. *v.* Moon, 39 Miss. 822; United States Exp. Co. *v.* Backman, 28 Ohio St. 144; Kansas City, etc. R. Co. *r.* Simpson, 30 Kan. 645; Moulton *r.* Railroad Co., 31 Minn. 85; Railroad Co. *v.* Little, 71 Ala. 611; Louisville, etc. Co. *r.* Wynn, 88 Tenn. 320, 14 S. W. Rep. 311; Magnin *v.* Dinsmore, 56 N. Y. 168; Westcott *v.* Fargo, 61 N. Y. 542; Rowan *v.* Exp. Co., 80 N. Y. Supp. 226, 80 App. Div. 31; Bernstein *v.* Weir, 83 N. Y. Supp. 48, 40 Misc. 635; Woodburn *v.* Railway Co., 40 Fed. 731; Railroad Co. *v.* Keener, 93 Ga. 808, 21 S. E. Rep. 287, 44 Am. St. Rep. 197.

39. Chesapeake, etc. R'y Co. *v.* Beasley, —— Va. ——, 52 S. E. Rep. 566; Express Co. *v.* Foley (Kan.) 26 Pac. Rep. 665; Kallman *v.* Express Co., 3 Kan. 205; Hopkins *v.* Westcott, 6 Blatch. 64; Brehme *v.* Adams Ex. Co., 25 Md. 328; Boorman *r.* Express Co., 21 Wis. 152; Oppenheimer *v.* United States Ex. Co., 69 Ill. 62; Levy *v.* Southern Ex. Co., 4 Rich. S. C.

Sec. 426. Same subject—Contracts limiting recovery to agreed value of goods.—The rule is well settled that the carrier, in order that he may exercise a degree of care and attention commensurate with the risk assumed, is entitled to be informed of the value of the goods intrusted to him for transportation. For the purpose, therefore, of securing such information and of establishing a basis upon which to compute his charges, the carrier may, by a contract fairly and honestly entered into with the owner of the goods, stipulate either that the goods are of a certain value,[40] or that their value does not exceed a certain sum[41] and that, in the event of loss, his liability shall not exceed the sum at which the goods are valued; and when fairly entered into with a view to placing a *bona fide* value on the goods, the contract will be conclusive on the owner, and the carrier will not be liable for a greater sum than that at which the goods are valued although his own misconduct has caused their loss.[42] And it has been held that where no men-

(N. S.) 234; Snider *v.* Adams Express Co., 63 Mo. 376; Ketchum *v.* American Ex. Co. 52 *id.* 390; Harvey *v.* Railroad Co., 74 Mo. 538; Louisville, etc. R. Co. *v.* Oden, 80 Ala. 38; South, etc. R. Co. *v.* Henlein, 52 Ala. 606, 56 Ala. 368; Hart *v.* Railroad Co., 112 U. S. 331; The Bermuda, 27 Fed. Rep. 476.

40. The following cases involve contracts where the value was fixed: Brehme *v.* Dinsmore, 25 Md. 328; Graves *v.* Railroad Co., 137 Mass. 33, 50 Am. Rep. 282; Hill *v.* Railroad Co., 144 Mass. 284, 10 N. E. Rep. 836; Zimmer *v.* Railroad Co., 137 N. Y. 460, 33 N. E. Rep. 642; Coupland *v.* Railroad Co., 61 Conn. 531, 23 Atl. Rep. 870, 15 L. R. A. 534.

41. For cases where a maximum value was agreed upon, see Hart *v* The Railroad, 112 U. S. 331, 28 L. Ed. 177, 5 Sup. Ct. Rep. 151; Durgin *v.* Express Co., 66 N. H. 277, 20 Atl. Rep. 328, 9 L. R. A. 453; Alair *v.* Railroad Co., 53 Minn. 160, 54 N. W. Rep. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764; Douglas Co. *v.* Transportation Co., 62 Minn. 288, 64 N. W. Rep. 899, 30 L. R. A. 860; Railroad Co., *v.* Payne, 86 Va. 481, 10 S. E. Rep. 749, 6 L. R. A. 849; Ballou *v.* Earle, 17 R. I. 441, 22 Atl. Rep. 1113, 33 Am. St. Rep. 881, 14 L. R. A. 433.

42. *United States:* Hart *v.* The Railroad, 112 U. S. 331, 28 L. Ed. 177, 5 Sup. Ct. Rep. 151; Jennings *v.* Smith, 106 Fed. 139, 45 C. C. A. 249; Metropolitan Trust Co. *v.* Railroad Co., 107 Fed. 628; Doyle *v.* Railroad Co., 126 Fed. 841; Macfarlane *v.* Express Co., 137 Fed. 982; Hopkins *v.* Westcott, 6 Blatch. 64; Earnest *v.* Ex-

tion is made in the contract as to the effect upon the carrier's liability of inserting the sum at which the goods are valued, the carrier, in the event of loss, will be liable only to the extent

press Co., 1 Woods, 573; Muser *v.* Holland, 17 Blatch. 412; Railway Co. *v.* Patrick, —— C. C. A. ——, 144 Fed. 632.

Alabama: South. etc. R. R. Co. *v.* Henlein, 52 Ala. 606; *s. c.* 56 Ala. 368; Railway Co. *v.* Jones, 132 Ala. 437, 31 So. Rep. 501; Railroad Co. *v.* Sherrod, 84 Ala. 178; but see Railway Co. *v.* Hughart, 90 Ala. 36, 8 So. Rep. 62.

Arkansas: Railroad Co. *v.* Weakly, 50 Ark. 397.

California: Michalitschke *v.* Wells Fargo & Co., 118 Cal. 683, 50 Pac. Rep. 847; Pierce *v.* Railroad Co., 120 Cal. 156, 47 Pac. Rep. 874, 40 L. R. A. 350, 354, 52 Pac. Rep. 302.

Connecticut: Coupland *v.* Railroad Co., 61 Conn. 531, 23 Atl. Rep. 870, 15 L. R. A. 534.

Georgia: Railway Co. *v.* Murphey, 113 Ga. 514, 38 S. E. Rep. 970, 53 L. R. A. 720; Railway Co. *v.* Johnson King & Co., 121 Ga. 231, 48 S. E. Rep. 807; Central, etc. R'y Co. *v.* Hall, —— Ga. ——, 52 S. E. Rep. 679.

Illinois: Oppenheimer *v.* United States Express Co., 69 Ill. 62; Railroad Co. *v.* Miller, 79 Ill. App. 473.

Indiana: Adams Express Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. Rep. 245, 64 N. E. Rep. 647, 94 Am. St. Rep. 279; Russell *v.* Pittsburg, etc., Ry. Co., 157 Ind. 311, 61 N. E. Rep. 678, 87 Am. St. Rep. 214, 55 L. R. A. 253; Railroad Co. *v.* McKinney, 34 Ind. App. 402, 73 N. E. Rep. 148; United States Express Co. *v.* Joyce, —— Ind. ——, 72 N. E. Rep. 865, *reversing*. (Ind. App.) 69 N. E. Rep. 1015.

Massachusetts: Squire *v.* New York Central R. R. Co., 98 Mass. 239; Graves *v.* Lake Shore R'y Co., 137 Mass. 33; Graves *v.* Express Co., 176 Mass., 280, 57 N. E. Rep. 462; John Hood Co. *v.* American, etc. Co., —— Mass. ——, 77 N. E. Rep. 638.

Maryland: Brehme *v.* Dinsmore, 25 Md. 329.

Minnesota: Moulton *v.* Railway Co., 31 Minn. 85; Alair *v.* The Railroad, 53 Minn. 160, 54 N. W. Rep. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764; Douglass Co. *v.* Railway Co., 62 Minn. 288, 64 N. W. Rep. 899, 30 L. R. A. 860; O'Malley *v.* Railway Co., 86 Minn. 580, 90 N. W. Rep. 974.

Missouri: Harvey *v.* Terre Haute R. R. Co., 74 Mo. 538; Conover *v.* Express Co., 40 Mo. App. 31; Crow *v.* Railroad Co., 57 Mo. App. 135; Vaughn *v.* Railway Co., 78 Mo. App. 639; *s. c.* 62 Mo. App. 461.

New York: Magnin *v.* Dinsmore, 56 N. Y. 168; *s. c.* 62 N. Y. 35; *s. c.* 70 N. Y. 410; Zimmer *v.* Railroad Co., 137 N. Y. 460, 33 N. E. Rep. 642, *affirming* 62 Hun, 619, 16 N. Y. Supp. 631; Toy *v.* Railroad Co., 56 N. Y. Supp. 182, 26 Misc. 792; Belger *v.* Dinsmore, 51 N. Y. 166.

North Carolina: Gardner *v.* Railway Co., 127 N. Car. 293, 37 S. E. Rep. 328.

Ohio: Railroad Co. *v.* Hubbard, 72 Ohio, 302, 74 N. E. Rep. 214.

Oregon: Normile *v.* Railroad & Navigation Co., 41 Or. 177, 69 Pac. Rep. 928.

Rhode Island: Ballou *v.* Earle, 17 R. I. 441, 22 Atl. Rep. 1113, 33 Am. St. Rep. 881, 14 L. R. A. 433.

South Carolina: Johnstone *v.* Railroad Co., 39 S. Car. 55, 17 S. E. Rep. 512.

Tennessee: Louisville, etc. R. Co. *v.* Lowell, 90 Tenn. 17, 15 S. W. Rep. 837; Louisville, etc. R. Co. *v.* Wynn, 88 Tenn. 320; Starnes *v.* Railroad Co., 91 Tenn. 516, 19 S. W. Rep. 675.

Washington: Hill *v.* Railway Co., 33 Wash. 697, 74 Pac. Rep. 1054. Words "Released value" must be construed to embrace real value.

West Virginia: Zouch *v.* Railway Co., 36 W. Va. 524, 15 S. E. Rep. 185, 17 L. R. A. 116. Will not release from liability where negligence is gross, wanton or willful.

Wisconsin: Loeser *v.* The Railway, 94 Wis. 571, 69 N. W. Rep. 372; Ullman *v.* Railway Co., 112 Wis. 150, 88 N. W. Rep. 41, 88 Am. St. Rep. 949, 56 L. R. A. 246.

In Moulton *v.* Railway Co., 31 Minn. 85, cited above, it is said: "We do not question the right of a carrier to require the disclosure, by the consignor, of the value of the property presented for transportation where its value is not apparent and well known. This is reasonable, both to the end that proper care may be taken of the property while it is in the hands of the carrier, and because the proper charges for transportation may often depend largely upon value. We see nothing, however, in this contract which can be regarded as having been intended or calling for such a disclosure on the part of the plaintiffs, or as estopping them from claiming a recovery, upon the ground of the carrier's negligence, of the actual value of the horses."

It is often a question whether an amount stated in a contract of shipment limiting the carrier's liability is inserted merely for the purpose of restricting such liability, or for the purpose of measuring the carrier's responsibility by the actual value of the property. When the words of the contract clearly indicate an intention to fix a value upon which the carrier may gauge his charges, and the contract was fairly entered into, it is almost universally recognized that the limitation is binding on the shipper; and in case of loss his recovery will be limited to the sum agreed upon. Ullman *v.* Railway Co., 112 Wis. 168, 88 N. W. Rep. 41, 88 Am. St. Rep. 949, 56 L. R. A. 246.

In Alair *v.* The Railroad Co., 53 Minn. 160, 54 N. W. Rep. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764, it appeared that the plaintiff delivered to the defendant for transportation seven horses of the value of $2,100. In the contract of shipment was a provision that the value of the horses did not exceed the sum of $100 each, which value was declared to be the value upon which the rate of compensation for the carrier's services was based. The horses were lost while in transit through the negligence of the carrier, and the plaintiff

of the sum agreed upon.[43] It has been contended by some courts[44] that contracts fixing an amount beyond which the carrier will not be liable, while conclusive on the owner of the goods where the carrier has been guilty of no misconduct contributing to the loss, are, in effect, limitations upon the carrier's legal liability and, as such, inoperative where the loss has

sued to recover the real value of the horses. In denying the plaintiff's right to recover more than the amounts stated in the contract, Mitchell, J., in speaking for the court, said: "If the purpose of this stipulation was merely to place a limit on the amount for which the defendant should be liable, then clearly, as to losses resulting from negligence, it is not just or reasonable, and is not binding on the plaintiff. On the other hand, if it was a stipulation as to the value of the property, fairly and honestly made as the basis of the carrier's charges and responsibility, then we think it ought to be upheld as a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting him against extravagant and fanciful valuations. And at this point we may suggest that so far as the question now under consideration is concerned, we see no difference between a case like the present, where the stipulation is that the value of the property does not exceed a specified sum, and one where the value is stipulated to be a specified sum. . . . We think that we are justified in taking judicial notice of the fact that the maximum value placed by this contract on different kinds of domestic animals are approximately those of average, ordinary animals in the country through which defendant does business. By executing this contract the plaintiff stipulated, and in effect represented to the defendant that, his horses were not worth to exceed $100 each, and that the charges for transportation should be based on that valuation. Assuming, as we must, that the contract was fairly made for the purposes expressed in it, we think it ought to be upheld as just and reasonable. It is not in any sense a contract for exemption from the consequences of negligence."

43. Coupland *v.* The Railroad, 61 Conn. 531, 23 Atl. Rep. 870, 15 L. R. A. 534.

44. Grogan *v.* Adams Express Co., 114 Pa. St. 523, 60 Am. Rep. 360; Weiller *v.* Railroad Co., 134 Pa. St. 310, 19 Atl. Rep. 702, 19 Am. St. Rep. 700; Ruppel *v.* Railroad Co., 167 Pa. St. 166, 31 Atl. Rep. 478, 46 Am. St. Rep. 666; Hughes *v.* Railroad Co., 202 Pa. St. 222, 51 Atl. Rep. 990, 97 Am. St. Rep. 713, 63 L. R. A. 513; Railroad Co. *v.* Owens, 93 Ky. 201, 19 S. W. Rep. 590; Railroad Co. *v.* Radford, 23 Ky. Law Rep. 886, 64 S. W. Rep. 511; Railroad Co. *v.* Taber, 98 Ky. 503, 32 S. W. Rep. 168; Railway Co. *v.* Graves, 21 Ky. Law Rep. 684, 52 S. W. Rep. 961.

been occasioned by his negligence. But it cannot fairly be said that such contracts tend to relieve the carrier from the consequences of his negligence. For the purpose of the contract the goods have no greater value than that agreed upon by the parties, and to that value the carrier must respond where his negligence has been instrumental in causing the loss. And it may be stated as now the well settled rule that where the contract fixes a sum beyond which it is stipulated the carrier will not be liable, and such contract has been fairly entered into with a view to placing a *bona fide* value on the goods, it will be upheld, although the carrier's negligence has occasioned the loss, as a just and lawful mode of securing a due proportion between the amount for which the carrier may be liable and the charges he receives, and as a lawful agreement to dispense with the necessity of offering testimony to prove the value of the goods; and the owner, after a loss has occurred, will be estopped by his admission from asserting that their value was more. As was said by Blatchford, J., in Hart *v.* The Railroad,[45] which is the leading case on the subject, "where a contract of the kind signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation."[46]

Sec. 427. Same subject—Valuation agreement must be bona fide—Valuation must be reasonable.—But while the owner of

45. 112 U. S. 331, 28 L. Ed. 177, 5 Sup. Ct. Rep. 151.

46. The learned justice further said: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has oc-

the goods and the carrier may fix a value on the goods beyond which the carrier in the event of loss will not be liable, the agreement fixing value, in order to be conclusive on the owner, must be *bona fide* and the value reasonable. If, for instance, the value agreed upon should be so far below the real value of the goods that from their appearance the carrier must have known of the discrepancy, the agreement fixing value would not be *bona fide* and, depending on no value at all, would amount to an arbitrary limitation upon the carrier's legal liability which, in the event of loss occasioned by negligence, would not deprive the owner of the right to recover the real value of the goods. While it is true that the owner of goods of great value which are concealed in packages or otherwise hidden from view, and

curred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss, and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

Where the contract exempts the carrier from *all* loss except for collision, and provides that the liability for a given article of freight shall not exceed a certain price, and the freight is injured from another cause, the shipper cannot, upon the ground that such a sweeping provision is invalid, recover more than the stipulated sum. Hill *v.* Railroad Co., 144 Mass. 284; Graves *v.* Railway Co., 137 Mass. 33.

upon which a very inconsiderable value has been placed by him, will be precluded, in case of loss, from the right to recover a greater sum than the value which he has placed upon them, the reason for this exception is, that to charge the carrier with their real value, when by the owner's misrepresentation he has been induced to undertake the employment at a reduced compensation and to lessen the degree of care and vigilance which he otherwise would have exercised, would be to sanction fraud and to enable the owner to gain an unfair advantage over the carrier through his own misrepresentation. The knowledge which the carrier has of the real value of the goods tendered to him for shipment would, therefore, seem to be material in determining the effect of the valuation agreement upon his liability, although a contrary conclusion has been reached by some courts. And it may be stated as the better rule that, where the value agreed upon is so out of harmony with the ordinary values of similar kinds of goods as to indicate that the question of value did not in fact enter into the agreement, and the carrier, under the circumstances, must have known of the discrepancy, the agreement placing a value on the goods will be considered as a mere attempt by the carrier to secure a partial exemption from liability, and of no effect in relieving him from the obligation of responding for their real value where his misconduct has occasioned their loss.[1] So in the absence of fraud

1. Railway Co. *v.* Jones, 132 Ala. 437, 31 So. Rep. 501; Railway Co. *v.* Stone & Haslett, 112 Tenn. 348, 79 S. W. Rep. 1031; Railway Co. *v.* McIntyre, (Tex. Civ. App.) 82 S. W. Rep. 346; Everett *v.* Railroad Co., 138 N. Car. 68, 1 L. R. A. (N. S.) 985; Central, etc., Ry. Co. *v.* Hall, —— Ga. ——, 52 S. E. Rep. 679. In Railway Co. *v.* Jones, *supra*, McClellan, C. J., said: "While under our adjudications the carrier, in consideration of reduced freight charges, may agree with the shipper that in case of loss or injury the recovery shall be limited to a valuation of the property expressed in the bill of lading, and such an agreement will be enforced by the courts when such valuation is not greatly below the real worth of the property, such agreements will not be countenanced or given effect if they are unreasonable,—if they limit damages for loss or injury to an amount greatly less than the damages in fact sustained. It is plain that this doctrine must be rested upon the same ground that

or concealment on the part of the owner of the goods whereby the carrier has been misled, the valuation agreed upon, it is said, must be reasonable, regard being had to the real value of the goods; and if such value be unreasonable, the owner will not be estopped from claiming damages on the basis of their real value.[2]

Sec. 428. Same subject—Execution of contracts limiting recovery to agreed value of goods—Construction.—If the owner, at the request of the carrier, deliberately places a value on the goods when he tenders them for transportation, he will, of course, where the carrier's request was made in good faith, be estopped from afterwards asserting that their value was more. So if the owner voluntarily accepts a receipt in which there is inserted a clause fixing a value upon the goods, he will be presumed, in the absence of proof of any unfair advantage having been taken of him, to have assented to the value stated.[3] Thus

underlies the original proposition forbidding agreements against liability for the results of negligence, —public policy. And in determining whether a stipulation is void as being against public policy, there is no room for inquiry into the knowledge, information or intention of the parties. The question is not what the parties knew, or intended, but what was the effect of the stipulation; not whether the parties intended evil or knew that their act was hurtful to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and duty of government to protect them. So it is immaterial, when a carrier has stipulated for a limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good in respect of a matter of governmental concern that he should be allowed to make such stipulation under any circumstances; and to allow it to stand in any instance or upon any consideration would be to emasculate the principle of public policy obtaining in the premises, and to leave the public exposed to uncertainties incident to injuries, into what carriers intended, or knew or had been informed as to the real value of the property transported by them."

2. Railway Co. *v.* Stone & Haslett, 112 Tenn. 348, 79 S. W. Rep. 1031.

3. Graves *v.* Express Co., 176 Mass. 280, 57 N. E. Rep. 462; John Hood Co. *v.* American, etc., Co., —— Mass. ——, 77 N. E. Rep. 638; Michalitschke *v.* Wells, Far-

in the case of Alair *v.* The Railroad,[4] Mitchell, J., in speaking for the court, said: "It makes no difference whether the valuation expressed in the contract is one previously made by the shipper on request of the carrier, or one inserted in the contract by the carrier without being named by the shipper but acquiesced in by him. In either case it becomes a part of the contract on which the minds of the parties meet and on which they act." Where, however, the valuation is written upon the receipt in such a manner that it cannot properly be said to form a part of the contract, as for instance, where it is written upon the back, it will be considered as a notice only and as such not conclusive on the owner unless it can be shown that it was known and assented to by him when he accepted the receipt.[5]

If the wording of the contract clearly indicates an intention to fix a value on the goods, parol evidence will, of course, be inadmissible to vary or explain its terms. But if the wording of the contract is not clear, or the receipt, although clearly expressing a valuation, is claimed to have been accepted under circumstances such that the owner's assent to its terms cannot reasonably be presumed, the contract will be viewed in the light of the situation of the parties at the time it was made, and extrinsic evidence of the circumstances surrounding its execution will be admissible for the purpose of showing whether a *bona fide* valuation agreement was made.[6] And if from such evidence it should appear that a *bona fide* agreement fixing the value of

go & Co., 118 Cal. 683, 50 Pac. Rep. 847. See *ante* § 408.

4. 53 Minn. 160, 54 N. W. Rep. 1072, 39 Am. St. Rep. 588, 19 L. R. A. 764. See also, Normile *v.* R. & N. Co., 41 Or. 177, 69 Pac. Rep. 928.

5. See *ante*, § 415; Doyle *v.* Railroad Co., 126 Fed. 841.

6. O'Malley *v.* The Railway, 86 Minn. 580, 90 N. W. Rep. 974; Power's Mercantile Co. *v.* Wells, Fargo & Co., 93 Minn. 143, 100 N. W. Rep. 735; Ullman *v.* The Railway, 112 Wis. 168, 88 N. W. Rep. 41, 88 Am. St. Rep. 949, 56 L. R. A. 246.

The construction of contracts of this nature and the obligations arising therefrom, and what the parties intended by the language employed, must, when the same is clear and unambiguous, be determined from the writing itself; and extrinsic evidence is inadmissible to alter or vary its terms. But when it is claimed that the limitations inserted therein were not fairly inserted, or that the

the goods was not in fact made, the owner, in case of loss, will be entitled to recover the full value of the goods. So if doubt arise as to the meaning of the terms employed, the doubt will be resolved against the carrier, it being well settled that such contracts will be construed most strongly against him.[7]

Sec. 429. Same subject—Measure of recovery where loss is only partial.—Where the parties have agreed that in the event of loss the liability of the carrier shall not exceed a certain sum at which it is stipulated the goods are valued, the question arises as to the extent of the carrier's liability where there has been only a partial loss of the goods. While it is held by some courts that the owner of the goods will be entitled to recover an amount equal to the actual loss sustained, providing such amount is not greater than the sum at which the goods are valued,[8] the better rule would seem to be that he should be confined in his recovery to an amount equal to that proportion of the real loss that the declared value of the goods bears to their actual value as it existed before the loss occurred.[9] Where the

carrier did not act in good faith, evidence of the circumstances surrounding its execution is admissible, not to contradict or vary its express terms, but to show whether it was fairly and honestly made in respect to the particular subject. Thus, where it appeared that the contract containing a valuation was signed at ten o'clock at night, just before the departure of the train on which the goods were to go, that no previous negotiations relative to what the contract should contain were had, and that the sum stated in the contract was inserted by the agent in accordance with his own estimate of similar kinds of goods, the shipper not having been consulted on the subject, nor informed that a valuation was necessary to estimate freight charges, it was held that evidence of the circumstances surrounding its execution was properly admissible for the purpose of showing whether or not it had been fairly and understandingly entered into. O'Malley *v.* Railway Co., *supra.*

7. Black *v.* Transportation Co., 55 Wis. 319; Gardner *v.* Railway Co., 127 N. Car. 293, 37 S. E. Rep. 328.

8. Brown *v.* Steamship Co., 147 Mass. 58, 16 N. E. Rep. 717; Starnes *v.* Railroad Co., 91 Tenn. 516, 19 S. W. Rep. 675; Nelson *v.* Railway Co., 28 Mont. 297, 72 Pac. Rep. 642; Goodman *v.* Railway Co., 71 Mo. App. 460.

9. United States Express Co. *v.* Joyce, —— Ind. ——, 72 N. E. Rep. 865, *reversing*, 69 N. E. Rep. 1015.

parties have stipulated that the carrier's liability in case of loss shall not exceed the sum at which the goods are valued, it is hardly reasonable to suppose that it was thereby intended that the carrier, in the event of only a partial loss, should be liable for an amount which might be equal to the sum fixed as the value of the goods, thus making it possible for the same amount to be recovered where the loss was only partial as would be recoverable where the loss was total. The owner, therefore, is held not to be estopped by the statement as to value from showing what the real value of the goods was for the purpose of arriving at the correct proportion.[10]

Sec. 430. Same subject—Contracts limiting recovery to value of goods at time and place of shipment.—The question whether the carrier may lawfully stipulate with the owner of the goods that in case of loss the value of the goods at the time and place of shipment shall be the measure of recovery has several times come before the courts, and conclusions not in harmony have been reached. It is contended on the one hand that if the parties may lawfully limit the amount to be recovered in case of loss to the sum at which the goods are valued, there can be no good reason why a standard may not be fixed by which such value shall be determined. On the other hand, it is said that the usual measure of damages is the market value of the goods as they should have arrived at the place of destination, and that a contract which has for its purpose the establishment of some other time and place must necessarily amount to a limitation upon the carrier's liability and be inoperative where the carrier's negligence has been instrumental in causing the loss.[11]

10. United States Express Co. *v.* Joyce, *supra.*

11. Ruppel *v.* The Railway, 167 Penn. St. 166, 31 Atl. Rep. 478, 46 Am. St. Rep. 666; Railway Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. Rep. 834; Railway Co. *v.* D'Arcais, 27 Tex. Civ. App. 57, 64 S. W. Rep. 813; Railroad Co. *v.* Bogard, 78 Miss. 11, 27 So. Rep. 879.

Without a consideration, usually a reduced rate, a clause in the contract of shipment fixing the damage in case of loss at the value of the goods at time and place of shipment instead of destination is invalid, since the usual legal liability would be the price of the goods at destination in their condition as they should have ar-

The former rule is sustained by the weight of authority, and the value as established at the time and place of shipment will ordinarily under such a stipulation be conclusive on the owner of the goods.[12]

Sec. 431. Same subject—Contracts limiting liability to fixed amount without regard to value.—From what has already been said upon the subject, it will be apparent that an agreement limiting the amount for which the carrier will be liable in case of loss must, in order to be conclusive on the owner, be based upon the value of the goods. If, therefore, the contract should provide that in case of loss the carrier's liability shall not exceed a

rived. Railroad Co. *v.* Coolidge, —— Ark. ——, 83 S. W. Rep. 333, 67 L. R. A. 555, citing Hutchinson on Carr.

12. Squire *v.* The Railroad, 98 Mass. 239, 93 Am. Dec. 162; Railroad Co. *v.* Oden, 80 Ala. 38; York Co. *v.* Railroad Co., 3 Wall. 107; Pearce *v.* Steamship Co., 24 Fed. 285; The Lydian Monarch, 23 Fed. 298; The Hadji, 18 Fed. 459; Pierce *v.* Railroad Co., 120 Cal. 156, 47 Pac. Rep. 874, 40 L. R. A. 350, 354; *s. c.* 52 Pac. Rep. 302; Railway Co. *v.* Harwell, 91 Ala. 340, 8 So. Rep. 649; Zouch *v.* Railway Co., 36 W. Va. 524, 15 S. E Rep. 185, 17 L. R. A. 116; Railroad Co. *v.* Phillipson, (Tex. Civ. App.) 39 S. W. Rep. 958; Railroad Co. *v.* Parish, 18 Tex. Civ. App. 130, 43 S. W. Rep. 1066; Tibbitts *v.* Railroad Co., 49 Ill. App. 567; Rogan *v.* Railway Co., 51 Mo. App. 665; 101 Live Stock Co. *v.* Railroad Co. 100 Mo. App. 674, 75 S. W. Rep. 782; Railway Co. *v.* Jones, 132 Ala. 437, 31 So. Rep. 501. In Shea *v.* Railway Co., 63 Minn. 228, 65 N. W. Rep. 458, it was held that a stipulation in a shipping contract providing that the amount of any loss or damage for which the carrier would be liable should be computed at the value of the property at the time and place of shipment was unjust, unreasonable, and contrary to public policy in that the freight charges paid or incurred by the consignee were ignored as an element of damages. But in Davis *v.* Railway Co., 70 Minn. 37, 72 N. W. Rep. 823, it was considered by the same court that there was really nothing in such a condition excluding from a computation of damages charges for transportation paid or incurred by or on behalf of the consignee, and that when so construed, the contract was not on its face unreasonable or opposed to public policy. But a condition in the contract that the value of the property at the time and place of shipment shall govern the settlement in which the amount claimed shall not exceed, for a stallion or jack, $200, for a horse or mule, $125, was held not to constitute a *bona fide* estimate or valuation. Central, etc., Ry. Co. *v.* Hall, —— Ga. ——, 52 S. E. Rep. 679.

certain sum, no reference being made to the value of the goods, and a loss occurs through some misconduct on the part of the carrier, the contract will be considered as a mere attempt to secure a partial exemption from liability for the consequences of negligence, and of no avail in relieving the carrier from liability for the full value of the goods.[13]

Sec. 432. Same subject—Effect of delivery, after notice given to stop goods in transit, upon agreement limiting recovery to stated value of goods—Conversion.—Although it is provided in the contract of shipment that the carrier will not be liable in case of loss for more than a certain sum at which it is stipulated the goods are valued, if the owner should exercise his right of stopping the goods while in transit, the law will at once create a new relation between the parties which is independent of the contract of shipment; and if the carrier should negligently make a delivery of the goods after the owner has thus exercised his right of stopping them in transit, the agreement limiting recovery to their stipulated value will be inoperative, and the owner may recover to the full extent of his actual loss.[14]

So where the carrier has converted the goods, he will be deemed to have thereby abandoned the contract of shipment, and he cannot thereafter insist on a stipulation that his liability

13. Abrams *v.* The Railway, 87 Wis. 485, 58 N. W. Rep. 780, 41 Am. St. Rep. 55; Railway Co. *v.* Murphy, 113 Ga. 514, 38 S. E. Rep. 970, 53 L. R. A. 720; Everett *v.* Railroad Co., 138 N. Car. 68, 50 S. E. Rep. 557, citing Hutchinson on Carr.; Railway Co. *v.* Witty, 32 Neb. 275, 49 N. W. Rep. 183, 29 Am. St. Rep. 436; Wells, Fargo & Co. *v.* Bell, 65 Ohio St. 408, 62 N. E Rep. 1035; Baughman *v.* Railroad Co., 14 Ky. Law Rep. 268; Railroad Co. *v.* Frazee, 24 Ky. Law Rep. 1273, 71 S. W. Rep. 437; Harned *v.* Railway Co., 51 Mo. App. 482; Railroad Co. *v.* Keener, 93 Ga. 808, 21 S. E. Rep. 287, 44 Am. St. Rep. 197; Railway Co. *v.* Johnson, King & Co., 121 Ga. 231, 48 S. E. Rep. 807; Eells *v.* Railway Co., 52 Fed. 903; Railroad Co. *v.* Lockwood, 84 U. S. (17 Wall), 357, 21 L. Ed. 627; Schwarzchild *v.* Steamship Co., 74 Fed. 257; The Kensington, 183 U. S. 263, 22 Sup. Ct. Rep. 102, 46 L. Ed. 190, *reversing*, 94 Fed. 885, 36 C. C. A. 533. See *ante*, § 425.

14. Rosenthal *v.* Weir, 170 N. Y. 148, 63 N. E. Rep. 65, 57 L. R. A. 527.

shall be limited to a certain sum at which the goods are valued;[15] nor can he do so where the negligence which occasioned the loss was wanton or wilful.[16]

Sec. 433. Notice contained in receipt that unless informed of value of goods carrier will be liable only to limited amount. —As will be seen in a later section,[17] the carrier is entitled to be informed of the value of the goods intrusted to him for transportation. Where the goods are open to his inspection, he, of course, is in a position to form an estimate of their value and compute his charges in proportion to the risk assumed; and an agreement fairly entered into with the shipper placing a value on the goods and stipulating that he will not be liable, in case of loss, beyond the sum at which the goods are valued, such value not being greatly disproportionate to the ordinary values of similar kinds of property, will be conclusive on the shipper.[18] But goods which are concealed in boxes or packages, or, if not so concealed, which are of such a character that from an ordinary inspection their real value is not apparent, are frequently offered to the carrier for transportation, and where their value is so concealed, he may, in order to know the degree of care and attention to bestow upon them, insert in the contract by which he undertakes to carry them, whether it be in the form of a receipt accepted by the owner or any other form of express contract, a provision that, unless apprised of their real value, he will not be liable in case of loss for more than a certain sum;

15. Railway Co. *v.* Sloat, 93 Ga. 803, 20 S. E. Rep. 219; Railway Co. *v.* Johnson, King & Co., 121 Ga. 231, 48 S. E. Rep. 807; Express Co. *v.* Joyce, —— Ind. ——, 72 N. E. Rep. 865. Where the carrier has been guilty of a conversion, he cannot insist on a stipulation that the amount of any loss or damage shall be computed at the value of the goods at the time and place of shipment. Merchants, etc., Co. *v.* Moore & Co., —— Ga. ——, 52 S. E. Rep. 802. Where the wrong complained of is a conversion of the goods after the contract of shipment has been performed, the carrier cannot claim advantage of a stipulation limiting the amount to be recovered. Railway Co. *v.* Chicago Portrait Co., 122 Ga. 11, 49 S. E. Rep. 727, 106 Am. St. Rep. 87.

16. Zouch *v.* Railway Co., 36 W. Va. 524, 15 S. E. Rep. 185, 17 L. R. A. 116.

17. See *post*, § 795.

18. See *ante*, § 426.

and if the shipper should desire that a greater liability be assumed than that provided for in the contract, he must inform the carrier, whether the inquiry be made of him or not, of the value of which he wishes him to assume the risk, and must compensate him accordingly.[19] Provisions of this character are

19. Smith *v.* Express Co., 108 Mich. 572, 66 N. W. Rep. 479; Michalitschke *v.* Wells, Fargo & Co., 118 Cal. 683, 50 Pac. Rep. 847; Macfarlane *v.* Adams Express Co., 137 Fed. 982; The Denmark, 27 Fed. 141; Belger *v.* Dinsmore, 51 N. Y. 166; Toy *v.* Railroad Co., 56 N. Y. Supp. 182, 26 Misc. Rep. 792; Hirsch *v.* Dispatch & Delivery Co., 85 N. Y. Supp. 198; Ballou *v.* Earle, 17 R. I. 441, 22 Atl. Rep. 1113, 33 Am. St. Rep. 881, 14 L. R. A. 433; Adams Express Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. Rep. 245; *s. c.* 64 N. E. Rep. 647, 94 Am. St. Rep. 297; U. S. Express Co. *v.* Joyce, —— Ind. ——, 72 N. E. Rep. 865; Graves *v.* Express Co., 176 Mass. 280, 57 N. E. Rep. 462; Royal, etc., Co. *v.* Weir, 95 N. Y. Supp. 575, 48 Misc. 376.

Where a book of blank receipts was furnished the shipper which contained on the inside of the cover a notice that the carrier would not be liable for more than $50, for any article carried, unless the true value was stated, the notice being referred to in each receipt, it was held that the notice of limitation was incorporated into a receipt filled out by the shipper, and that he could not by inattention say that he did not read the condition and thereby impose on the carrier liability for a greater value than that expressed in the contract. Gerry *v.* Am. Ex. Co., —— Me. ——, 62 Atl. Rep. 498.

Where goods are delivered to an express company for transportation, and a contract is accepted by the shipper which provides that the liability of the carrier shall be limited in case of loss to the sum of $50, the carrier, in the absence of anything showing that he had knowledge of the true value of the goods, will be responsible only to the amount named. It is the duty of the shipper to disclose the true value of the goods and to pay accordingly if he would hold the carrier liable to a greater amount than that named in the contract, and, if he remains silent and pays charges computed on the sum named, he cannot later say that the value of the goods exceeded such sum. Smith *v.* Express Co., *supra.*

In Michalitschke *v.* Wells Fargo & Co., *supra*, it appeared that the plaintiff, through his agent, delivered to the defendant carrier at the city of New York four packages of cigars of the value of $625, which the defendant undertook to carry to the city of San Francisco. The receipt, which was accepted at the time the goods were delivered to the carrier, provided that Wells Fargo & Co. was not to be held liable for loss or damage for any amount exceeding $50, unless the true value was stated in the receipt. During transit, the goods were destroyed by fire. The plaintiff sued for the full value of

almost universally to be found in the receipts of express companies and frequently in those of other carriers, and the rule has become well settled that if the owner of goods of greater value than is indicated by the box or package in which they are concealed accepts such a receipt when the goods are received by

the packages. The defendant contended that its liability was governed by the terms of the receipt and in its answer averred that the plaintiff had full knowledge of such terms, that it believed the value of the packages did not exceed fifty dollars, and that it would have charged a greater rate if the true value had been stated. The plaintiff interposed a demurrer to the answer which the trial court sustained. In reversing the judgment of the trial court, McFarland, J., said: "The demurrer should have been overruled. We presume the demurrer was sustained upon the ground that a common carrier cannot, by contract with a customer, relieve himself from responsibility for his own negligence, and that the contract set up in the answer is void because contrary to legal policy. But the rule established by the weight of the authorities is that, where goods done up in packages are received by a carrier for transportation, he cannot be held responsible in case of loss for damages beyond the value of the goods agreed upon with the shipper, and furthermore, that an instrument in writing, such as that set up in the answer, and made under the circumstances there detailed, constitutes a contract as to such value. The rule is fair and just. It would be unreasonable for a shipper to expect his packages to be carried for a compensation based upon an agreed valuation much less than the actual value, and then, in case of loss, recover the full value. As common carriers are insurers and are liable for all losses, whether caused by their own negligence or not, except those which are the result of an act of God or a public enemy, they are entitled to know the value of goods concealed in packages; and where, in such a case, the shipper agrees to a certain value, he should not be heard in case of loss to claim a greater value. Such a contract is fair and reasonable and not contrary to public policy."

In the case of The Denmark, 27 Fed. Rep. 141, arising in the district court for the southern district of New York, a quantity of highly valuable musk was shipped on the steamer under a bill of lading which read, "Not accountable for . . . highly valuable goods or beyond the amount of one hundred pounds sterling for any one package, unless bills of lading are signed therefor, and the value therein expressed, and freight paid accordingly." The value of the musk, which was £202 3s, was not disclosed by the shipper nor was extra freight paid. It was usual to pay a much larger rate on musk. The musk was shipped in a case with another case of small value and like it in

the carrier for transportation, and fails to inform the carrier of their extraordinary value, or to pay charges on them in proportion to the risk he would have the carrier assume, he cannot, in case of their loss, impose a greater liability upon him than the limit prescribed in the contract, unless the loss was occasioned by negligence of so gross a character as to be tantamount to a misfeasance.

Sec. 434. Same subject.—Thus in the case of Oppenheimer *v.* The Express Company,[20] the facts were that a box having the appearance of containing goods of only ordinary value but really containing jewelry worth several thousand dollars was delivered to the express company to be carried from New York

appearance. On the voyage the case was rifled and the musk lost. The action was to recover its value. Brown, D. J., said: "The libelant's agents must be assumed to have been acquainted with the fact that extra freight was by custom always payable on musk, as well as with the usages of this line of steamers, and with the bills of lading and their stipulations, including the stipulation above quoted. These stipulations had been long in use, and it was the plain duty of the shipper to make known the extreme value of the musk package, and to pay freight accordingly, both from the custom and from the express stipulations. I cannot regard the shipment of these valuable articles as ordinary merchandise, along with other cases of small comparative value and of similar external appearance, without making known the great value of one of the cases, as other than presumptively a fraudulent concealment and imposition upon the carrier. The right of a carrier to protect himself against claims for extraordinary damage by stipulating for notice of articles specially valuable in order that special care may be given to them, and to require the payment of a proportionate compensation, is now too well settled to be questioned. Muser *v.* American Exp. Co., 1 Fed. Rep. 382; The Hadji, 18 Fed. Rep. 459; Hart *v.* Pennsylvania R. Co., 112 U S. 331; Magnin *v.* Dinsmore, 70 N. Y. 410. No express inquiry by the carrier was necessary. The duty of disclosure was incumbent on the shipper. Good faith required it. Warner *v.* Western Transp. Co., 5 Rob. 490; Tate *v.* Hyslop, 15 Q B. Div. 368." The libel was dismissed.

But where the article was exposed, and its nature was known to the carrier, it was held that a notice contained in the receipt to the effect that unless its true value was stated the carrier would not be liable for more than $50, was not conclusive on the shipper. Hayes *v.* Adams Ex. Co., —— N. J. Law, ——, 62 Atl. Rep. 284.

20. 69 Ill. 62.

to Chicago for the plaintiffs. A receipt in the ordinary form of express companies' receipts, containing the clause limiting the carrier's liability in case of loss to $50, unless a higher value was fixed by the shipper and a rate for carriage paid accordingly, was at the same time presented to the company's agent for signature and was signed by him, the space in the receipt for filling in the value when fixed by the shipper being left unfilled with any amount, and nothing being said upon that subject, the shipper paying only about $1.50 for the carriage instead of the amount to which the carrier would have been entitled had its real value been stated. The box was carried safely to destination as ordinary freight, being supposed to contain goods of but little value. Whilst there in the company's warehouse and before the company had had time to make delivery of it, it was consumed by a devastating fire. It appeared that all the valued packages were saved; but the fire had spread so rapidly that the company had not been able to save its ordinary freight with which this box had been put. The attempt was made to hold it liable nevertheless upon the ground of negligence; but it was said that even if ordinary negligence had been shown, there could have been no recovery by reason of the failure of the plaintiff's agent to disclose the value of the box at the time of its shipment and pay the increased rate; and that to hold otherwise would be an imposition upon the carrier. And in another case in which the facts were almost exactly the same, except that there was very strong evidence that the goods were lost by the negligence of the carrier, it was said that the silence as to value amounted to such an imposition upon the defendant (the carrier) as would relieve it from a liability for the total value of the goods unless something more was shown than negligence to carry safely and deliver promptly. But it was added that while such a concealment under the contract relieves the carrier from liability for a loss occurring from ordinary negligence, it was not intended to be said that he would be thus relieved where his acts or those of his servants amount to a misfeasance or abandonment of his character as a carrier.[21]

21. Magnin *v.* Dinsmore, 62 N. Y. 35; *s. c.* 70 N. Y. 410.

Sec. 435. Same subject—But carrier may waive requirement that, unless value of goods is stated, he will be liable only to limited amount.—The carrier may, however, by accepting the box or package with knowledge, obtained either from a previous course of dealing or from the appearance of the box or package itself, of what it contains estop himself from insisting on a provision in the receipt that unless the true value of the goods is stated he will be liable only to a limited amount. Thus where a valuable piece of statuary was shipped in a box which was marked "marble statuary," and it appeared that the plaintiff was a well known art dealer who for a period of twenty-seven years had been shipping works of art over the defendant's road, it was held that the shipment having been made in the usual manner, the carrier, by accepting the box containing the statuary, waived the condition in the receipt that unless the true value of the goods was disclosed, he would be liable only to a limited amount.[22]

Sec. 436. (§ 251.) Same subject—How under English Carriers' Act.—This contract restricting the liability of the carrier to a limited amount, in case of the failure of the bailor for carriage to declare a higher value and pay a higher rate for the carriage accordingly, is similar to the limitation provided by the English Carriers' Act, the first section of which enacts that no common carrier by land shall be liable for the loss of any of the articles therein enumerated if the value of such property shall exceed £10, "unless at the time of the delivery the value and nature be declared and an increased charge or an engagement to pay the same be accepted," the benefit of which cannot be claimed if it be shown that the loss arose from the felonious acts of the carrier's servants;[23] and under which it has been held that where the value of the goods is above £10, the duty devolves upon the owner to make known such value and pay the

22. Rathbone *v.* Railroad Co., 140 N. Y. 48, 35 N. E. Rep. 418, *reversing* 69 Hun, 617, 23 N. Y. Supp. 1148.

23. Metcalfe *v.* The Railway Co., 4 Com. B. (N. S.) 307.

increased price for carriage if he desires insurance for a greater value; and if he fails to do so, he can derive no benefit from the fact that the carrier knew the value of the goods.[24] And when such declaration of value is made, it is conclusive upon him in case of loss.[25]

Sec. 437. (§ 252.) Same subject—When shipper bound to disclose value—Limitation by notice—Regulations.—We have already seen that where there is no special contract limiting the common-law liability of the carrier, and no qualification of the risk assumed by him by any notice so specially brought to his knowledge as to have that effect, the owner of the goods is not bound to disclose their value unless inquiry is made by the carrier, but that the carrier has the right to make such inquiry and to have a true answer; and that if he is deceived by the artifice of the owner or even by his unintentional concealment of such value or by a false answer given, he will not be liable.[26] If, however, he makes no inquiry, and no artifice or unfair means are used to deceive him, he is responsible for the value in case of loss however great the value.[27] The rule is different, however, where there is a special contract that in case no value is fixed upon the goods by the shipper at the time of the bailment, and

24. Boys *v.* Pink, 8 Car. & P. 361.

25. McCance *v.* Railway Co., 3 H. & C. 343.

26. See *ante*, §§ 328-332.

27. "As a general rule," says Blatchford, J., in Hart *v.* Railroad Co., 112 U. S. 331, "and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent's Comm. 603, and cases cited; Relf *v.* Rapp, 3 Watts & Serg. 21; Dunlap *v.* International Steamboat Co., 98 Mass. 371; Railroad Co. *v.* Fraloff, 100 U. S. 24."

remuneration made for the carriage and risk accordingly, he will be responsible only to a limited amount;[28] or perhaps where notice that such were the carrier's terms is brought directly to the knowledge of the shipper, which might make such notice, if unobjected to, tantamount to a contract to that effect; or if, from previous dealings between the parties, this condition were known to the shipper.[29] Such notices, it has been said, are not proposals which ripen into contracts between the carrier and his customers, when the services of the former are engaged in the transportation of the goods, to lessen or restrict his common-law liability; but they are rather to be looked upon in the light of rules or regulations which the carrier may prescribe in the conduct of his business, in order to insure that fair dealing on the part of his employers which the law requires; and when his services are engaged with a full knowledge on the part of his employer that such are the terms upon which he carries, fair dealing would seem to require that he should be held to them as tantamount to a contract. They would stand upon the same ground as notices by the carrier that he would not be liable for the breakage of brittle goods unless informed of their nature, or for the damage by detention to goods subject to rapid decay if their character was concealed from him, to which no objection has ever been made because they were unreasonable or because they were mere notices.[30]

Sec. 438. Same subject—Illustrations.—In the case of Duntley *v.* The Railroad,[31] the right of the carrier to limit his liability to a stated amount, by a regulation to that effect, was recognized. There it appeared that the carrier had a regulation that rates for the transportation of animals were based upon and intended only for those of ordinary value, which in the case of horses was fixed at $200, and that when animals of greater value were offered for carriage an additional charge would be

28. See *ante*, § 433; *post*, § 441.

29. See *ante*, § 414. See Graves *v.* Express Co., 176 Mass. 280, 57 N. E. Rep. 462.

30. See *ante*, § 414.

31. 66 N. H. 263, 20 Atl. Rep. 327. See, also, Durgin *v.* Express Co., 66 N. H. 277, 20 Atl. Rep. 329; Klair *v.* Steamboat Co., 4 Pennewill, (Del.) 51, 54 Atl. Rep. 694.

made. The plaintiff, with knowledge of this regulation, shipped a horse by defendant's line as an ordinary horse. The horse being injured, the plaintiff claimed and recovered in the lower court damages to the amount of $350. The supreme court, however, held that he was bound by the regulation, saying that the plaintiff's conduct in shipping his horse as an ordinary horse, in the face of this regulation, was equivalent to a declaration on his part that its value and the carrier's liability did not exceed $200. "The rule or regulation of the defendant," said the court, "of which the plaintiff had notice, was not designed, and did not purport, to relieve the defendant from its common-law responsibility as a carrier. The purpose was to secure information as to the value of the animals received for transportation, and compensation proportionate to the risk incurred. As such the regulation was a reasonable one, and not in conflict with the general principle that a common carrier cannot discharge himself of legal responsibility by general notice.[32] . . . There is no injustice in restricting the shipper's claim for damages to the value he places upon his property for transportation. If the plaintiff obtained the lowest rate of freight by shipping his horse as of ordinary value, it is not unreasonable that his recovery should be restricted to $200, which was the amount of the risk the parties understood the plaintiff paid for and the defendant assumed as carrier."[33]

Sec. 439. (§ 253.) Same subject—Notice under English Carriers' Act.—The rule was well established by a number of well-considered English cases, when public notices in regard to the limitation of their common-law liability were resorted to by carriers, and before the legislation which destroyed their validity. Before the passage of the Carriers' Act, it was customary for common carriers to give public notice that they would not be carriers of packages of over the value of £5 unless information

32. Citing Moses *v.* Railroad Co., 24 N. H. 71; Hart *v.* Railroad Co., 112 U. S. 331.

33. Citing Magnin *v.* Dinsmore, 62 N. Y. 35; Squire *v.* Railroad Co., 98 Mass. 239; Graves *v.* Railway Co., 137 Mass. 33; Hill *v.* Railroad Co., 144 Mass. 284.

was given of the actual value and the carriage paid for accordingly. Cases frequently occurred in which the employer had delivered to the carrier a package of greater value without giving the required information or paying the higher rate for the service, and the package having been lost, the attempt was made to hold the carrier liable; but it was uniformly held by the English courts that this could not be done.[34] The object of such notices was said to be to prevent the necessity of inquiry by the carrier of the value of the package in every particular instance, the responsibility of doing which the law, without such notice, threw upon him. The notice, however, was held to cast the duty of making the disclosure of value upon the owner of the goods, and the offer of payment for the carriage according to the excess of such value over the limited sum; and in case he failed to do so, the carrier had the right to presume that the package or goods were of the value only to which by the notice he had limited his liability; and in case the value should prove greater, and the terms of his notice had not been complied with, it was a fraud upon him and the contract for carriage was a nullity, and the owner of the goods could recover nothing. And the law as thus established was left unaltered by the Land Carriers' Act except in so far as it destroyed the effect of what were known as public notices, requiring them to be given according to its provisions. So that as to all other carriers except those engaged in railway and canal traffic, by the express terms of the act, so long as they comply with its conditions, the duty is incumbent upon the bailor, as a condition precedent to the liability of the carrier, to make known to him the value of the goods where it exceeds £10 and to pay or engage to pay the increased charge for the carriage.[35]

Sec. 440. (§ 254.) Same subject—Weight of English cases. —These cases are of course of no authority in this country ex-

34. Clay *v.* Willan, 1 H. Bl. 298; Yate *v.* Willan, 2 East. 128; Izett *v.* Mountain, 4 *id.* 371; Nicholson v. Willan, 5 *id.* 507; Brignold *v.* Waterhouse, 1 M. & S. 259; Batson *v.* Donovan, 4 B. & Ald. 21.

35. Wyld *v.* Pickford, 8 M. & W. 443; Metcalfe *v.* Railway Co., 4 C. B. (N. S.) 307.

cept so far as they may show the reasonableness of such notices, not as contracts between the carrier and his employers limiting the common-law liability of the former, but as rules which he may adopt with the knowledge of his employer to prevent fraud and deception, and that he may know the risk which he is assuming and be paid accordingly. The carrier certainly should not be deprived of all means of thus protecting himself; and so long as the duty of disclosing the actual value and paying the compensation for its carriage, wherever it exceeds the limited value which the carrier announces that he will, unless otherwise instructed, place upon it, is cast upon the shipper only where he accepts a receipt for the goods embodying the condition, or where notice is directly given to him otherwise and he makes no objection, or where a course of dealing between himself and the carrier must have made him familiar with the requirement, no objection can be seen to it. If the carrier cannot protect himself to this extent, great injustice might in many instances be done him. By accepting the service of carriage upon terms as to liability so directly and certainly brought to his knowledge, the shipper indicates his choice of the portion of the risk which he desires the carrier to assume and for which he is willing to pay, and his silence as to the real value must be regarded as the same thing as an assertion of the limited value which the carrier holds himself out as assuming unless otherwise informed and compensated. Besides, the purpose of the shipper in thus withholding the truth can only be supposed to be to procure the carriage for less than the adequate reward; and having for this purpose misled the carrier as to the needed care to be bestowed upon the goods, but for which the loss would have probably been avoided, the rule would seem to be unfair which would hold the latter liable for the extraordinary value.[36]

Sec. 441. (§ 255.) Same subject—Notice from course of dealing.—Accordingly there are cases in this country which

36. See Hart *v.* Railroad Co., 112 U. S. 331, where similar conclusions were reached, and the English cases of Gibbon *v.* Paynton, 4 Burr. 2298, and Batson *v.* Donovan, 4 B. & A. 21, were cited.

hold that where, either from a previous course of dealing between the parties or from direct notice, it was known to the shipper that the carrier received goods for transportation only upon terms that they should be considered as of a certain value, which should be the limit of his liability, unless they were valued at a higher sum and paid for accordingly, if the goods are delivered for carriage without any notice of their being of a higher value and are lost, the limit of the recovery would be the value which the carrier had fixed by his own terms.[37] And if the means resorted to by carriers to protect themselves are to be tested by their justice and reasonableness, as the rule is said to be by the supreme court of the United States in The Railroad *v.* Lockwood,[38] no objection could be well made to such rule unless we deny to the carrier all right to protect himself by a mere notice.[39]

Sec. 442. (§ 259.) Carrier may limit time within which claim shall be made for loss.—It is frequently the custom for

37. Orange Bank *v.* Brown, 9 Wend. 114; Oppenheimer *v.* Express Co., 69 Ill. 62; Magnin *v.* Dinsmore, 62 N. Y. 35; Farmers' & M. Bank *v.* Champlain T. Co., 23 Vt. 186; Moses *v.* Railroad, 4 Foster, 71; 2 Greenleaf on Ev. § 215; Western T. Co. *v.* Newhall, 24 Ill. 466; Hopkins *v.* Westcott, 6 Blatch. 64; Klair *v.* Wilmington Steamboat Co., 4 Pennewill, (Del.) 51, 54 Atl. Rep. 694.

38. 17 Wall. 357.

39. The distinction between the notice which goes to the limitation of the liability of the carrier and that which is intended only as a protection against imposition in his business is fully recognized by Cowen, J., in his opinion in Cole *v.* Goodwin, 19 Wend. 251. "I will only repeat," says he, "in respect to this case what seems to me perfectly obvious, and which I have, if not very unsuccessful, made somewhat apparent to others, that the difference between the two cases from Burrow and East (Gibbon *v.* Paynton and Nicholson *v.* Willan) and that of Evans *v.* Soule (2 Maule & S. 1) is, that the notices in the former went merely to protect against the fraud of the bailor, and the latter to conceal and favor fraud directed against the owner and in favor of the party giving the notice. The one was for and the other against public morals; the former said merely 'give me a due reward and I will be accountable as a common carrier;' the latter, 'give me the same reward' (for the carrier fixes it; it may be less, but it may also be more), 'and yet I claim to throw all risk upon you, or such a degree of it as I please.'

the carrier to insert in the contract of shipment a condition that, in the event of loss, the owner shall give notice of his claim within a specified time. Such conditions are usually to the effect that the notice shall be in writing and presented to some officer or agent of the carrier, either before the goods are removed from the point of destination or within a certain time thereafter, or within a designated time after the loss has occurred; and when such conditions are reasonable, the owner will be precluded from the right to maintain an action against the carrier unless he has presented the notice within the time stated and in the manner provided.[40] The object of conditions

In the former, the plaintiff sought to commit and did commit actual frauds after express notice that he must be honest. He sought in that way to deprive the laborer of a reasonable reward for his hire. In the latter, he was paid all he demanded and yet he refuses to carry under the obligation required by law."

40. *England:* Lewis *v.* Railway Co., 5 H. & N. 867.

United States: Express Co. *v.* Caldwell, 21 Wall. 264; The Queen of the Pacific, 180 U. S. 49, 45 L. Ed. 419, 21 Sup. Ct. R. 278, *reversing* Pacific Coast S. S. Co. *v.* Bancroft Whitney Co., 94 Fed. 180, 36 C. C. A. 135, and 78 Fed. 155; Angel *v.* Steamship Co., 55 Fed. 1005; Central, etc. R. Co. *v.* Soper, 59 Fed. 879, 8 C. C. A. 341, 21 U. S. App. 24; Ginn *v.* Ogdensburg Transit Co., 85 Fed. 985, 29 C. C. A. 521; Metropolitan Trust Co. *v.* Railroad Co., 107 Fed. 628; The Artic Bird, 109 Fed. 167; The Westminster, 127 Fed. 680, 62 C. C. A. 406, *affirming* 116 Fed. 123.

A provision that the shipowner is not to be liable for any claim, notice of which is not given before the removal of the goods, will be construed as meaning the removal from the place of deposit of the goods upon the dock or wharf when freed from the ship's tackle, and, as thus construed will be reasonable and valid. The St. Hubert, 107 Fed. 727, 46 C. C. A. 603, *affirming* 102 Fed. 362.

A stipulation limiting the time within which suit shall be filed applies as well to a suit *in rem* against the vessel carrying the property as to an action *in personam* against the owner. The shipper cannot avoid the operation of such a stipulation by simply changing his form of action from one *in personam* to one *in rem*. The Queen of the Pacific, *supra;* The St. Hubert, *supra.*

Alabama: Railroad Co. *v.* Sanders, 135 Ala. 504, 33 So. Rep. 482.

Arkansas: Railroad Co. *v.* Hurst, 67 Ark. 407, 55 S. W. Rep. 215. Under a provision requiring notice of claim before the removal of live stock and within one day after delivery, it was held that since the provision was inserted for the benefit of the carrier to give him an opportunity to exam-

of this character, it is said, is to enable the carrier, while the occurrence is recent, to better inform himself of what the actual facts occasioning the loss or injury were, and thus protect himself against claims which might be made upon him after such a lapse of time as to frequently make it difficult, if not impossible, for him to ascertain their truth. It is just, therefore, that

ine the stock before it was mingled with other stock, it did not apply to stock that had been killed, because as to such stock the carrier had all the opportunity necessary to examine it. Railway Co. *v.* Ayres, 63 Ark. 331, 38 S. W. Rep. 515.

Canada: Express Co. *v.* Martin, 26 S. C. R. 135; Gelinas *v.* Railway Co., 11 Rap. Jud. Que. (C. S.) 253; Steamship Co. *v.* Drysdale, 32 S. C. R. 379.

Georgia: Railway Co. *v.* Adams, 115 Ga. 705, 42 S. E. Rep. 35, citing Hutchinson on Carr. It is provided under the code that a common carrier cannot limit his legal liability by any notice given either by publication or by entry on receipts. *Held*, that a stipulation in a bill of lading exempting the carrier from liability unless notice should be given within a specified time was not effectual for that purpose without proof that the shipper assented thereto. Railroad Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. Rep. 838, 44 Am. St. Rep. 37.

Illinois: Chicago, etc. R. Co. *v.* Simms, 18 Ill. App. 68; Railway Co. *v.* Newlin, 74 Ill. App. 638; Railway Co. *v.* Bozarth, 91 Ill. App. 68; Railroad Co. *v.* Ross, 105 Ill. App. 54; Railroad Co. *v.* Fox, 113 Ill. App. 180. That the shipper did not read the contract is no defense if no fraud was practiced upon him. Black *v.* Railroad Co., 111 Ill. 350; *ante* § 408.

Indiana: Case *v.* The Railway, 11 Ind. App. 517, 39 N. E. Rep. 426; Railway Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. Rep. 1105; Anderson *v.* The Railway, 26 Ind. App. 196, 59 N. E. Rep. 396, citing Hutchinson on Carr; Railway Co. *v.* Fifth National Bank, 26 Ind. App. 600, 59 N. E. Rep. 43.

In Adams Ex. Co. *v.* Reagan, 29 Ind. 21, a stipulation in the company's receipt that it was not to be liable for any loss or damage unless claim in writing was made in thirty days after date of receipt was held unreasonable and void. But in the subsequent case of the United States Express Co. *v.* Harris, 51 Ind. 127, a stipulation in exactly the same words in the company's receipt was held to be valid and binding upon the owner of the goods, there being nothing unreasonable in such a condition; and it was said that the decision in the previous case of the Express Co. *v.* Reagan was to be explained by the unsettled state of the country when the receipt in that case was given, it having been during the civil war, and the undertaking of the company having been to carry the goods from Indiana to Savannah in the state of Georgia, which, under such circumstances, might be attended with great delay.

the owner, when a loss or injury has occurred, should be required, as a condition precedent to enforcing the carrier's lia-

Iowa: Hudson *v.* The Railroad, 92 Iowa, 231, 60 N. W. Rep. 608, 54 Am. St. Rep. 550.

Kansas: Sprague *v.* Railroad Co., 34 Kan. 347; Railroad Co. *v.* Collins, 47 Kan. 11, 27 Pac. Rep. 99; Railroad *v.* Temple, 47 Kan. 7, 27 Pac. Rep. 98, 13 L. R. A. 362; Railway Co. *v.* Kirkham, 63 Kan. 255, 65 Pac. Rep. 261; Railway Co. *v.* Morris, 65 Kan. 532, 70 Pac. Rep. 651; Railway Co. *v.* Park, 66 Kan. 248, 71 Pac. Rep. 586; Kalina & Cizek *v.* The Railroad, 69 Kan. 172; 76 Pac. Rep. 438; Railroad Co. *v.* Crittenden, 4 Kan. App. 512, 44 Pac. Rep. 1000.

Massachusetts: Cox *v.* The Railroad, 170 Mass. 129, 49 N. E. Rep. 97.

Minnesota: Engesether *v.* The Railway, 65 Minn. 168, 68 N. W. Rep. 4.

Mississippi: Southern Express Co. *v.* Hunnicutt, 54 Miss. 566.

Missouri: Dawson *v.* The Railroad, 76 Mo. 514; Rice *v.* The Railroad, 63 Mo. 314; Harned *v.* The Railway, 51 Mo. App. 482, citing Hutchinson on Carr; Hamilton *v.* The Railroad, 80 Mo. App. 597; 101 Live Stock Co. *v.* The Railroad, 100 Mo. App. 674, 75 S. W. Rep. 782; Freeman *v.* Railway Co., —— Mo. App. ——, 93 S. W. Rep. 302; Bellows *v.* Railway Co., —— Mo. App. ——, 94 S. W. Rep. 557.

New York: American Grocery Co. *v.* The Railroad, 51 N. Y. Supp. 307, 23 Misc. 356; Hirshberg *v.* Dinsmore, 12 Daly, 429; Smith *v.* Dinsmore, 9 Daly, 188.

In Westcott *v.* Fargo, 61 N. Y. 551, where the condition in the receipt was that the company would not be liable for any loss or damage "unless the claim therefor should be made in writing within thirty days from the *accruing of the cause of action*," and it was contended for the defendant that as no claim had been made within the prescribed time there could be no recovery, the opinion was announced that this could not be considered in the nature of a condition precedent to the right to recover. It was said that this clause assumed that the plaintiff had a cause of action which had already accrued to him before the thirty days commenced to run, and in that view was in the nature of a statute of limitations, and as defendant had not set it up in its answer, it could not avail him. "Had we come to the conclusion," say the court, "that the clause was a condition precedent, the question would have been open to consideration whether so short a time was reasonable."

North Carolina: Selby *v.* The Railroad, 113 N. Car. 588, 18 S. E. Rep. 88, 37 Am. St. Rep. 635; Wood *v.* The Railway, 118 N. Car. 1056, 24 S. E. Rep. 704; Gwyn Harper Mfg. Co. *v.* The Railroad, 128 N. Car. 280, 38 S. E. Rep. 894, 83 Am. St. Rep. 675.

North Dakota: Hatch *v.* Railway Co., —— N. Dak. ——, 107 N. W. Rep. 1087; Welch *v.* Railway Co., 14 N. Dak. ——, 103 N. W. Rep. 396.

Ohio: Railroad Co. *v.* Hubbard, 72 Ohio, 302, 74 N. E. Rep. 214.

Pennsylvania: Pavitt *v.* The

bility, to give notice of his claim according to the reasonable conditions of the contract.

Sec. 443. Same subject—Condition limiting time within which claim shall be made must be reasonable.—The owner, however, will not be precluded from the right to recover for a loss or injury where, to require him to present a notice of his claim within a specified time, would be unreasonable.[1] Thus if

Railroad, 153 Penn. St. 302, 25 Atl. Rep. 1107; Eckert *v.* The Railroad, 211 Penn. St. 267, 60 Atl. Rep. 781; Weir *v.* Express Co., 5 Phila. 355.

Tennessee: Southern Express Co. *v.* Glenn, 16 Lea, 472; Glenn *v.* Express Co., 86 Tenn. 594.

Texas: Gulf, etc. Ry. Co. *v.* Trawick, 68 Tex. 314; Texas, etc. Ry. Co. *v.* Adams, 78 Tex. 372; Railway Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. Rep. 834.

The Iowa code provides that no contract, receipt, rule or regulation shall operate to relieve any railroad corporation from the liability of a common carrier which would exist had no contract, receipt, rule or regulation been made. It was held under this provision that a condition to the effect that no claim for loss or damage should be valid, unless made in writing and delivered to an agent of the railroad company within 10 days from the time the goods were removed from the cars, could not be upheld. Grieve *v.* The Railroad, 104 Iowa, 659, 74 N. W. Rep. 192.

In Kentucky, by constitution, common carriers are forbidden to contract for relief from their common law liability. An agreement that no claim for loss or damage to stock should be valid against the carrier, unless made in writing and delivered to an agent of the carrier within 10 days after the stock was removed from the cars, was held to be violative of the constitutional provision and therefore void. Brown *v.* The Railroad, 100 Ky. 525, 38 S. W. Rep. 862; Railroad Co. *v.* Radford, 23 Ky. Law Rep. 886, 64 S. W. Rep. 511. See also, Ohio, etc. Railroad Co. *v.* Taber, 98 Ky. 503, 36 S. W. Rep. 18, 34 L. R. A. 685.

A provision that notice of claim must be presented within 10 days from the date of unloading the goods is held to be void under the law of Nebraska. Union Pacific R. Co. *v.* Thompson, —— Neb. ——, 106 N. W. Rep. 598.

1. Central, etc. R. Co. *v.* Soper, 59 Fed. 879, 8 C. C. A. 341, 21 U. S. App. 24; The Minnetonka, 132 Fed. 52; Southern Express Co. *v.* Caperton, 44 Ala. 101; Express Co. *v* Bank of Tupelo, 108 Ala. 517, 18 So. Rep. 664; Railway Co. *v.* Steele, 6 Ind. App. 183, 33 N. E. Rep. 236; Richardson *v.* The Railway, 62 Mo. App. 1; Popham *v.* Barnard, 77 Mo. App. 619; Osterhoudt *v.* The Railway, 62 N. Y. Supp. 134, 47 App. Div. 146; Jennings *v.* The Railway Co., 127 N. Y. Supp. 438, 28 N. E. Rep. 394; Dixie Cigar Co. *v.* Express Co., 120 N. Car. 348, 27 S. E. Rep. 73, 58

the contract were to provide that notice of the claim should be presented within a certain time to some officer or agent nearest the point of destination, and it were shown that the officer or agent was at such a distance from that point, or was so otherwise inaccessible that the owner in the exercise of reasonable diligence could not have presented the notice within the time stated, the condition would be unreasonable and would not avail the carrier.[2] In determining whether the time within which the notice of claim must be presented is reasonable, re-

Am. St. Rep. 795; Memphis, etc. R. Co. *v.* Holloway, 9 Baxt. 188; Railroad Co. *v.* Temple, 47 Kan. 7, 27 Pac. Rep. 98, 13 L. R. A. 362; Goggin *v.* Railway Co., 12 Kan. 416; Missouri, etc. Ry. Co. *v.* Paine, 1 Tex. Civ. App. 621, 21 S. W. Rep. 78; Railway Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. Rep. 834; Pecos, etc. Ry. Co. *v.* Evans, etc. Co., —— Tex. Civ. App. ——, 93, S. W. Rep. 1024.

A stipulation in a bill of lading which requires a written claim for loss or damage to be made within 30 days after the loss or damage occurs, where the entire transit may reasonably consume the whole of such time, is unreasonable and void. Central, etc. R. Co. *v.* Soper, *supra.*

But the fact that the shipper gives notice of his claim as soon as he learns of the injury will not excuse him for failure to give it within the time stated where he made no effort, after the shipment arrived, to learn of its condition. Freeman *v.* Railway Co., —— Mo. App. ——, 93 S. W. Rep. 302.

2. Engesether *v.* The Railway, 65 Minn. 168, 68 N. W. Rep. 4; Missouri, etc. Ry. Co. *v.* Paine, 1 Tex. Civ. App. 621, 21 S. W. Rep. 78. Where a stipulation in a stock shipping contract provided that the owner of the stock, as a condition to his right to hold the carrier liable for loss or damage to the stock, should give notice in writing of his claim to the nearest station agent or some officer of the carrier before the stock was moved from the place of destination and before it was mingled with other stock, and it was shown that the point to which the stock was to be transported was several hundred miles beyond the carrier's line of railroad, and that at such place there was no officer or agent upon whom the service of notice could be had, it was held that the contract was unreasonable and therefore void. Carpenter *v.* The Railway, 67 Minn. 188, 69 N. W. Rep. 720.

A requirement that notice in writing shall be given to an initial carrier before stock, which has passed over several connecting lines, has been removed from destination, is unreasonable. Coles *v.* Railroad Co., 41 Ill. App. 607. But since a carrier, in undertaking by contract to carry over several connecting routes to destination, adopts the routes of such connecting carriers as its own, notice served upon an agent of the final

gard must be had to the time which might ordinarily be expected to elapse in the usual course of business before the owner, by the exercise of reasonable diligence, could be in a position to present the notice to the carrier;[3] and since the question must depend upon the circumstances of the individual case, it is ordinarily one of fact for the jury.[4] So if the injury to the goods be such that the owner in the exercise of reasonable diligence could not have discovered its extent until after the time for presenting notice of his claim had expired, the condition would be unreasonable and a notice presented within such reasonable time thereafter as would enable him to ascertain the extent of his loss would be a substantial and sufficient compliance with the condition.[5]

Sec. 444. Same subject—Carrier may waive benefit of such conditions.—A condition requiring that notice of claim must be presented within a certain time, being intended for the bene-

carrier will be sufficient. Railway Co. *v.* Koch, 47 Kan. 753, 28 Pac. Rep. 1013.

3. Cox *v.* Railroad Co., 170 Mass. 129, 49 N. E. Rep. 97.

4. International, etc. R. Co. *v.* Garrett, 5 Tex. Civ. App. 540, 24 S. W. Rep. 354; Texas, etc. Ry. Co. *v.* Barber, (Tex. Civ. App.) 30 S. W. Rep. 500; Railway Co. *v.* Ayers, 63 Ark. 331, 38 S. W. Rep. 515.

5. Railway Co. *v.* Steele, 6 Ind. App. 183, 33 N. E. Rep. 236; Popham *v.* Barnard, 77 Mo. App. 619; Railroad Co. *v.* Temple, 47 Kan. 7, 27 Pac. Rep. 98, 13 L. R. A. 362. Failure to give notice of claim within the time agreed upon will not prevent a recovery where the injuries sustained were such that they could not readily have been seen and were not actually discovered until the time for giving notice had passed. Oxley *v.* The Railroad, 65 Mo. 629; Rice *v.* The Railway, 63 Mo. 314; Jennings *v.* The Railway, 127 N. Y. 438, 28 N. E. Rep. 394.

Since the object of a stipulation requiring notice of claim within a certain time is to prevent fraud on the carrier, if the injury be such that with ordinary diligence its extent cannot be discovered within the period named, a notice of claim within such reasonably short time thereafter as will effectually secure the carrier against fraud will be a sufficient compliance with the stipulation. Railroad Co. *v.* Sanders, 135 Ala. 504, 33 So. Rep. 482.

If the carrier requires notice of claim to be given within an unreasonably short time, the shipper is not relieved from giving any notice whatever. He must still give notice of his claim within a reasonable time; that is, he must at least comply with the requirement to the extent that he reasonably can. Osterhoudt *v.* The Railway,

fit of the carrier, he may, either expressly or by conduct inconsistent with an intent to rely upon it, waive the benefit of the condition. Thus if the carrier by his conduct should induce the owner to delay the presentment of the notice until after the time fixed for presenting it had expired, he would not be permitted to escape liability on the ground that the notice of claim was not presented within the stipulated time.[6] And if the agent

62 N. Y. Supp. 134, 47 App. Div. 146.

6. Bennett *v.* Express Co., 12 Oreg. 49; Merrill *v.* Express Co., 62 N. H. 514; Railway Co. *v.* Trawick, 80 Tex. 270, 15 S. W. Rep. 568; Railway Co. *v.* Ball, 80 Tex. 602, 16 S. W. Rep. 441; Railway Co. *v.* Jacobs, 70 Ark. 401, 68 S. W. Rep. 248; Soper *v.* Railroad Co., 113 Mich. 443, 71 N. W. Rep. 853; Railroad Co. *v.* Grimes, 71 Ill. App. 397; Railroad Co. *v.* Johnson, 114 Ill. App. 545; Railway Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. Rep. 198; Frankfurt *v.* Weir, 83 N. Y. Supp. 112, 40 Misc. 683; Falkenberg *v.* The Railroad, 59 N. Y. Supp. 44, 28 Misc. 165; Hess *v.* The Railway Co., 40 Mo. App. 202; Harned *v.* The Railway, 51 Mo. App. 482; Wood *v.* The Railway, 118 N. Car. 1056, 24 S. E. Rep. 704; United States Watch Case Co. *v.* Express Co., 120 N. Car. 351, 27 S. E. Rep. 74; Hinkle *v.* The Railway Co., 126 N. Car. 932, 36 S. E. Rep 348, 78 Am. St. Rep. 685; Railroad Co. *v.* Bogard, 78 Miss. 11, 27 So. Rep. 879; Railroad Co. *v.* Lazarus, 13 Ky. Law Rep. 461.

Where it is shown that the proper agents of the carrier had verbal notice of loss, and that they acted upon it without demanding any written notice, promptly making all the investigation desired, a requirement that written notice of loss or damage should be given within a certain time will be deemed to have been waived. Railway Co. *v.* Jacobs, 70 Ark. 401, 68 S. W. Rep. 248.

Where the carrier fails to allege in its answer the existence of a condition requiring notice of claim within a certain time, or the manner in which the shipper has failed to comply with it, but goes to trial on an answer setting up other defenses, it will be deemed to have abandoned or waived the condition as a defense. Railway Co. *v.* Pace, 69 Ark. 256, 63 S. W. Rep. 62, citing Hutchinson on Carr.

But the fact that the carrier relinquishes his right to insist upon certain exemptions from his common law liability by virtue of a contract previously made will not relieve the shipper from presenting a written claim for loss where the contract of shipment so provides. Because the carrier may waive the benefit of certain provisions exempting him from liability in case of loss, he does not thereby waive the right to demand the performance of a condition on the part of the shipper which is to be performed after the delivery of the goods. Pavitt *v.* The Railroad, 153 Penn. St. 302, 25 Atl. Rep. 1107. So the failure of

of the carrier should induce the owner to go to the trouble and expense of making out a notice of his claim, and should lead him to believe that its presentment would not be insisted upon within the stipulated time, the carrier would be estopped from availing himself of the owner's failure to present it within such time as a defense.[7] So if the carrier should accept a verbal notice without objection, and should treat the claim as pending, his conduct would amount to a waiver of a condition that the notice should be in writing.[8] If the notice be defective in matter of form, as, for instance, if there were no affidavit attached as was required by the contract, and the carrier should accept it and enter into negotiations for a settlement, his conduct would constitute a waiver of the requirement.[9] And it is held that a failure by the carrier to insert in the contract such information as is necessary to enable the owner to comply with its provisions in respect to giving notice will be equivalent to a waiver of the condition.[10] But where, beside a stipulation requiring that notice of any claim shall be given the carrier within a certain time, it is provided that no agent of the carrier has any authority to waive or modify any of the provisions of the contract, conduct by an agent which would ordinarily amount to a waiver will not be binding on the carrier.[11]

the agents of a steamship line to insist upon notice of claim on prior occasions will amount to nothing on the question of waiver in a later case. The Westminster, 127 Fed. 680, 62 C. C. A. 406.

Where the carrier receives a claim after the time limited for presentment has expired, treats it as pending and then rejects it on other grounds, he will be deemed to have waived his right to notice within the time limited. McFall *v.* Railroad Co., —— Mo. App.; ——, 94 S. W. Rep. 570.

7. Hudson *v.* The Railroad, 92 Iowa, 231; 60 N. W. Rep. 608, 54 Am. St. Rep. 550.

8. Frankfurt *v.* Weir, 83 N. Y. Supp. 112, 40 Misc. 683; Railroad Co. *v.* Grimes, 71 Ill. App. 397; Railway Co. *v.* Jacobs, 70 Ark. 401, 68 S. W. Rep. 248. See also, Isham *v.* Erie R. Co., 98 N. Y. Supp. 609.

9. Wabash, etc. R. Co. *v.* Brown, 152 Ill. 484, 39 N. E. Rep. 273, *affirming* 51 Ill. App. 656; Soper *v.* The Railroad, 113 Mich. 443, 71 N. W. Rep. 853; Summers *v.* The Railroad, —— Mo. App. ——, 79 S. W. Rep. 481; Ingwersen *v.* Railway Co., —— Mo. App. ——, 92 S. W. Rep. 357.

10. Railway Co. *v.* Reeves, 97 Va. 284, 33 S. E. Rep. 606, 16 Am. & Eng. R. Cas. (N. S.) 166.

11. Railway Co. *v.* Kirkham, 63 Kan. 255, 65 Pac. Rep. 261.

Since stipulations of this character are intended to secure the carrier against fraud and imposition, it is held that if the carrier is aware of the condition of the goods before they are removed from the place of destination, and is afforded ample opportunity to examine and inspect them, a notice of claim presented to him shortly after the goods are removed will be a substantial compliance with a condition requiring the owner to present a notice of his claim before the goods are removed from the place of delivery.[12]

Sec. 445. Same subject—How where damage has resulted from carrier's delay—Effect of failure to make delivery—Conversion.—Since the purpose of these conditions is to afford the carrier a prompt opportunity to investigate the nature and extent of an alleged injury to the goods, they will be construed as referring only to claims for injuries to the goods themselves and not to claims for damages arising from a decline in their market value due to a delay by the carrier in sending them forward.[13] Nor can the carrier insist on the performance of a condition that notice of claim shall be presented within a certain time after the goods have arrived at their destination where they have never in fact arrived at such point.[14] So where the car-

12. Railroad Co. *v.* Temple, 47 Kan. 7, 27 Pac. Rep. 98, 13 L. R. A. 362.

13. Kramer *v.* The Railway, 101 Iowa 178, 70 N. W. Rep. 119; Loeb *v.* The Railway, —— Mo. App. ——, 85 S. W. Rep. 118; Leonard *v.* The Railway, 54 Mo. App. 293; *s. c.* 57 Mo. App. 366; Louisville, etc. R. Co. *v.* Bell, 13 Ky. Law Rep. 393; Louisville, etc. R. Co. *v.* Smith, 14 Ky. Law Rep. 814.

14. A condition that a claim for damages must be made within 36 hours after the consignee has been notified of the arrival of the freight at the place of delivery is nullified by the failure of the goods to arrive at all at such place. Ward *v.* The Railway, 158 Mo. 226, 58 S. W. Rep. 28.

A condition that a claim for damages should be filed within 20 days after delivery, or after the time for delivery, cannot be pleaded as a defense to an action for misdelivery where instead of informing the consignee that delivery had been made, the carrier falsely asserted that he still continued to hold the goods and promised a speedy return. Marrus *v.* Steamboat Co., 62 N. Y. Supp. 474, 30 Misc. Rep. 421, *reversing*, 60 N. Y. Supp. 994.

Where the shipper of a live animal contracted to give the carrier notice in writing of his claim in

rier has been guilty of a conversion of the goods, he cannot escape liability on the ground that the owner failed to present a notice of his claim according to the contract of shipment.[15]

Sec. 446. Same subject—How where carrier is holding goods in the capacity of a warehouseman.—Where the carrier is rightfully retaining possession of the goods in the capacity of a warehouseman, as where he is holding them at their destination for the purpose of securing his freight charges, he may still claim the protection of a stipulation in the contract of shipment that no claim for loss or damage shall be valid unless presented in writing within a limited time. The retention of the goods in the capacity of a warehouseman is an incident to the contract for their transportation, and the stipulation will not be deemed inapplicable in respect to the ordinary and incidental duties of a warehouseman which may rest upon him when his duties as a carrier have ceased.[16]

Sec. 447. Same subject—Burden of proof.—It has been held that a stipulation in the contract of shipment requiring the owner of the goods to present a notice of his claim to the carrier within a specified time after the goods have arrived at their destination is in the nature of a condition precedent to the

case of damage or injury to the animal within five days after the loss or injury occurred, and the animal, after it was injured, was not taken to destination where timely notice might have been given, but was hauled by the carrier, without the shipper's knowledge or direction, to a point beyond his reach and there killed, it was held that to require the shipper to give notice of his claim within the five days would be unreasonable and unjust and that he was not bound by the condition. Richardson *v.* The Railway, 149 Mo. 311, 50 S. W. Rep. 782, 13 Am. & Eng. R. Cas. (N. S.) 170.

15. Merchants, etc. Transportation Co. *v.* Moore & Co., —— Ga. ——, 52 S. E. Rep. 802; Railway Co. *v.* Fifth Natl. Bank, 26 Ind. App. 600, 59 N. E. Rep. 43; Railway Co. *v.* Potts & Co., 33 Ind. App. 564, 71 N. E. Rep. 685. A stipulation limiting the time for presentation of claims for loss or injury does not apply to a case where an express company is charged with a failure to account for money collected by it. Bardwell *v.* Express Co., 35 Minn. 344.

16. Armstrong *v.* The Railway, 53 Minn. 183, 54 N. W. Rep. 1059.

owner's right to enforce a recovery, and that he must show in the first instance that he has complied with the condition, or that the circumstances were such that to have complied with it would have required him to do an unreasonable thing.[17] The weight of authority, however, sustains the view that such a stipulation is more in the nature of a limitation upon the owner's right to a recovery, and that the burden of proof is accordingly on the carrier to show that the limitation was reasonable and that the owner omitted to present the notice in proper form or within the time stated.[18] But in the case of Baxter *v.* The Railroad,[19] it was said: "It would seem that the apparent conflict between decisions bearing on the question may be reconciled upon the just construction that, when the shipper seeks to avoid such a condition, as applied to a shipment over the carrier's own line, the burden is upon him to prove such facts and circumstances as render compliance with its terms impracticable or unreasonable; but that, when the carrier seeks to apply it to a shipment terminating on a connecting line, it must show that it had an officer or station agent at or near the place of delivery upon whom the required notice could have been served, and who could, by reasonable diligence on the part of the consignee, have been ascertained and found."

Sec. 448. Carrier may limit time within which suit shall be commenced.—The carrier may, by an agreement with the owner of the goods, provide that, in case of loss or damage, suit

17. Kalina & Cizek *v.* Railroad Co., 69 Kan. 172, 76 Pac. Rep. 438. The burden rests upon the shipper to prove such notice when the failure to give it is set up as a defense. The Westminster, 127 Fed. 680, 62 C. C. A. 406; *s. c.* 116 Fed. 123.

18. Cox *v.* Railroad Co., 170 Mass. 129, 49 N. E. Rep. 97; Railway Co. *v.* Ayers, 63 Ark. 331, 38 S. W. Rep. 515; Railway Co. *v.* Pace, 69 Ark. 256, 63 S. W. Rep. 62; Railway Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. Rep. 834; Missouri, etc. Ry. Co. *v.* Paine, 1 Tex. Civ. App. 621, 21 S. W. Rep. 78; Hatch *v.* Railway Co., —— N. Dak. ——, 107 N. W. Rep. 1087, citing Kahnweiler *v.* Ins. Co., 67 Fed. 483, 14 C. C. A. 485; Malloy *v.* Railway Co., 109 Wis. 29, 85 N. W. Rep. 130; Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. Rep. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1.

19. 165 Ill. 78, 45 N. E. Rep. 1003, *reversing* 64 Ill. App. 130.

shall be commenced within a limited time, and, if the limitation is reasonable, it will be conclusive on the owner of the goods although it will require him to file his suit before the period fixed by the statute of limitations has expired.[20] But in Kentucky where common carriers are forbidden to contract against their liability as it exists at the common law, a stipulation limiting the time within which suit should be commenced was held to be contrary to the statute of limitations and therefore void.[21]

Sec. 449. (§ 259a.) Where liability is limited by contract, burden of proof is upon the carrier to show himself within the exception.—Where under the contract of shipment the carrier is exempted from liability for losses arising from certain designated causes, the burden of proving that a loss which has occurred falls within the exceptions of the contract rests upon the carrier.[22] But where the loss occurs from such a cause

20. Gulf, etc. Ry. Co. *v.* Gatewood, 79 Tex. 89; Texas, etc. Ry. Co. *v.* Hawkins, (Tex. Civ. App.) 30 S. W. Rep. 1113; Texas, etc. Ry. Co. *v.* Klepper, 5 Tex. Ct. Rep. 533, 24 S. W. Rep. 567; Railway *v.* Godair Commission Co., (Tex. Civ. App.) 87 S. W. Rep. 871; North British & Mercantile Insurance Co. *v.* The Railroad, 40 N. Y. Supp. 1113; 9 App. Div. 4; *affirmed without opinion*, 158 N. Y. 726, 53 N. E. Rep. 1128; Central, etc. R. Co. *v.* Soper, 59 Fed. 879, 8 C. C. A. 341, 21 U. S. App. 24. Whether or not the time limited within which suit must be filed is reasonable is usually a question for the jury. Railway Co. *v.* Hume, 87 Tex. 211, 27 S. W. Rep. 110; Gulf, etc. Ry. Co. *v.* Clarke, 5 Tex. Civ. App. 547, 24 S. W. Rep. 355. If the carrier's conduct is such as to reasonably induce the shipper to believe that his claim for damages will be paid without suit, and for such reason suit is not brought within the time stipulated, the shipper will not be precluded from the right to maintain an action after the expiration of the stipulated time. Railway Co. *v.* Silegman, (Tex. Civ. App.) 23 S. W. Rep. 298.

21. Express Co. *v.* Walker, 26 Ky. Law Rep. 1025, 83 S. W. Rep. 106.

22. See *post*, § 1353, where the subject is more fully treated. See also, Missouri, etc. Ry. Co. *v.* Mfg. Co., 79 Tex. 26, 14 S. W. Rep. 785; Ryan *v.* Railway Co., 65 Tex. 15; Steele *v.* Townsend, 37 Ala. 247; Alabama, etc. R. Co. *v.* Little, 71 Ala. 611; Park *v.* Preston, 108 N. Y. 434; Brown *v.* Express Co., 15 W. Va. 812; Hull *v.* Railway Co., 41 Minn. 510; Bonfiglio *v.* The Railway, 125 Mich. 476, 84 N. W. Rep. 772; Schaeffer *v.* The Railroad, 168 Penn. St. 209, 31 Atl. Rep. 1088, 47 Am. St. Rep. 884; Louisville, etc. R. Co. *v.* Bourne, 15 Ky. Law Rep. 445; Mitchell *v.*

that the law will not presume negligence, or where it happens from an excepted cause, as from fire, the burden of proving that the carrier was guilty of negligence and that such negligence contributed to the loss is, by the weight of authority, upon the plaintiff.[23]

Sec. 450. (§ 260.) Carrier cannot provide by contract against liability for negligence.—The question whether the carrier can exempt himself from liability for losses occurring from the negligence of himself or his servants or employees is one upon which the authorities differ. By the English law, as we have seen, he possesses the unlimited power to do so under the several acts in relation to carriers, and the construction which has been given them by the English courts. In this country,

The Railroad, 124 N. Car. 236, 32 S E. Rep. 671, 44 L. R. A. 515; Parker *v.* The Railroad, 133 N. Car. 335, 45 S. E. Rep. 658, 63 L. R. A. 827; Johnstone *v.* The Railroad, 39 S. Car. 55, 17 S. E. Rep. 512; Railroad Co. *v.* Lawler, 40 Neb. 356, 58 N. W. Rep. 968; Kalina & Cizek *v.* The Railroad, 69 Kan. 172, 76 Pac. Rep. 438, citing Hutchinson on Carr; Railway Co. *v.* Grocery Co., 55 Kan. 525, 40 Pac. Rep. 899; Normile *v.* Railroad Co., 41 Or. 177, 69 Pac. Rep. 928; Steamship Co. *v.* Burrows, 36 Fla. 121, 18 So. Rep. 349; The Guy C. Goss, 53 Fed. 826; The Beeche Dene, 55 Fed. 525, 5 C. C. A. 207, 2 U. S. App. 582; Insurance Co. *v.* Transportation Co., 97 Fed. 653; Argo Steamship Co. *v.* Seago, 101 Fed. 999, 42 C. C. A. 128; Doherr *v.* Houston, 128 Fed. 594, 64 C. C. A. 102; The Patria, 132 Fed. 971, 68 C. C. A. 397; Jenkins *v.* Railway Co., —— S. Car. ——, 53 S. E. Rep. 480; McFall *v.* Railway Co., —— Mo. App. ——, 94 S. W. Rep. 570.

23. See *post*, § 1355. See also, Louisville, etc. R. Co. *v.* Manchester Mills, 88 Tenn. 653; Little Rock, etc. Ry. Co. *v.* Talbot, 39 Ark. 523; Transportation Co. *v.* Downer, 11 Wall. 133; Wertheimer *v.* Railroad Co., 17 Blatchf. 421; The Glendarroch, Johnson & Co. *v.* Wainwright Bros. & Co., L. R. (1894) P. 226, 63 L. J. P. 89; Railroad Co. *v.* Sherwood, 132 Ind. 129, 31 N. E. Rep. 781, 32 Am. St. Rep. 239, 17 L. R. A. 339, citing Hutchinson on Carr; Indianapolis, etc. Ry. Co. *v.* Forsythe, 4 Ind. App. 326, 29 N. E. Rep. 1138; Morse *v.* The Railway, 97 Me. 77, 53 Atl. Rep. 874; Van Akin *v.* The Railroad, 87 N. Y. Supp. 871, 92 App. Div. 23; Thyll *v.* The Railroad, 87 N. Y. Supp. 345, 92 App. Div. 513; The Henry B. Hyde, 90 Fed. 115, 32 C. C. A. 534, 61 U. S. App. 147; The Lennox, 90 Fed. 308; Crowell *v.* Union Oil Co., 107 Fed. 302, 46 C. C. A. 296; The Isaac Reed, 82 Fed. 566; The Timor, 67 Fed. 356, 14 C. C. A. 412, 35 U. S. App. 278; The Flintshire, 69 Fed. 471.

since it has been admitted that he might contract for a limited liability, various opinions have been entertained by the different courts upon the question whether, conceding this general right, an exception ought not, upon grounds of public policy as well as upon legal precedent, to be made, of the power to enter into contracts to screen himself from the consequences of negligence in the performance of his duties. Our state courts are divided upon this subject, as we have seen them to be upon several other questions relating to the rights and duties of carriers; and this difference exists not only in the unqualified concession of the power by some of them and its unqualified denial by others, but amongst those which concede the power, some attempt to put a limit upon it by distinguishing between the different degrees of negligence, allowing it only as to slight or ordinary negligence, but not as to that of a grosser character. But the great weight of authority in this country is in favor of excluding it altogether as an element of contract between the carrier and his employer, and of holding the former to a rigid responsibility for every degree of negligence, without the power by contract or in any other mode to divest himself of it.[24]

24. *Alabama:* Mobile, etc. R. R. *v.* Hopkins, 41 Ala. 486; Montgomery, etc. R. R. *v.* Edmonds, 41 Ala. 667; Steele *v.* Townsend, 37 Ala. 247; Southern Express Co. *v.* Crook, 44 Ala. 468; South., etc., R. R. *v.* Henlein, 52 Ala. 606; Railroad Co. *v.* Grant, 99 Ala. 325, 13 So. Rep. 599; Railroad Co. *v.* Cowherd, 120 Ala. 51, 23 So. Rep. 793; Railway Co. *v.* Jones, 132 Ala. 437, 31 So. Rep. 501; Railroad Co. *v.* Sanders, 135 Ala. 504, 33 So. Rep. 482; Louisville, etc. R. R. Co. *v.* Oden, 80 Ala. 38.

California: Pierce *v.* The Railroad, 120 Cal. 156, 47 Pac. Rep. 874, 52 Pac. Rep. 302, 40 L. R. A. 350, citing Hutchinson on Carr.

Connecticut: Camp *v.* Steamboat Co., 43 Conn. 333.

Delaware: Finn *v.* The Railroad, 1 Hous. 469.

Georgia: Berry *v.* Cooper, 28 Ga. 543; but see Cooper *v.* The Railroad, 110 Ga. 659, 36 S. E. Rep. 240, where a contract exempting the carrier from liability for loss unless occasioned by fraud or gross negligence was held to excuse the carrier if he could show that he had exercised slight diligence. In the carriage of live stock the carrier, under the law as construed by the supreme court of Georgia, may limit his liability to gross negligence. Central, etc. Ry. Co. *v.* Hall, —— Ga. ——, 52 S. E. Rep. 679.

Indiana: Michigan, etc. R. R. Co.

Sec. 451. (§ 261.) Same subject—The contrary view.—The other view of the question is, however, taken by some of the courts of the highest authority. In some of them the unlimited power is allowed to carriers to contract for exemption from all

v. Heaton, 37 Ind. 448; Ohio, etc. R. R. Co. *v.* Selby, 47 Ind. 471; Adams Express Co. *v.* Harris, 120 Ind. 73; Baltimore, etc. Ry. Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. Rep. 1106; Anderson *v.* The Railway, 26 Ind. App. 196, 59 N. E. Rep. 396.

Iowa: Rose *v.* The Railroad, 39 Iowa, 246; Stewart *v.* Dispatch Co., 47 Iowa, 229; Hudson *v.* The Railroad, 92 Iowa, 231, 60 N. W. Rep. 608, 54 Am. St. Rep. 550.

Kansas: Kansas, etc. R. R. Co. *v.* Reynolds, 17 Kan. 251.

Kentucky: Baughman *v.* The Railroad, 94 Ky. 150, 21 S. W. Rep. 757, citing Hutchinson on Carr; Railroad Co. *v.* Bell, 13 Ky. Law Rep. 393; Orndorff *v.* Express Co., 3 Bush, 194.

Louisiana: Maxwell *v.* The Railroad, 48 La. Ann. 385, 19 So. Rep. 287.

Maine: Fillebrown *v.* The Railroad, 55 Me. 462; Sager *v.* The Railroad, 31 Me. 228; Willis *v.* The Railroad, 62 Me. 488.

Massachusetts: School District *v.* The Railroad, 102 Mass. 552; Commonwealth *v.* The Railroad, 108 Mass. 7; Cox *v.* The Railroad, 170 Mass. 129, 49 N. E. Rep. 97.

Minnesota: Jacobus *v.* The Railroad, 20 Minn. 125; Shriver *v.* The Railroad, 24 Minn. 506.

Mississippi: Southern Express Co. *v.* Moon, 39 Miss. 822; Mobile, etc. R. R. Co. *v.* Weiner, 49 Miss. 725; Southern Express Co. *v.* Seide, 67 Miss. 609, 7 So. Rep. 547; Chicago, etc. R. Co. *v.* Moss, 60 Miss. 1003; New Orleans, etc. R. Co. *v.* Faler, 58 Miss. 911; Railroad Co. *v.* Bogard, 78 Miss. 11, 27 So. Rep. 879; Southern Ex. Co. *v.* Marks, etc. Co., —— Miss. ——, 40 So. Rep. 65.

Missouri: Read *v.* The Railroad, 60 Mo. 199; Wolf *v.* American Express Co., 43 Mo. 421; Ketchum *v.* American Merchants' Union Ex. Co., 52 Mo. 390; Snider *v.* Adams Ex. Co., 63 Mo. 376; McFadden *v.* The Railway, 92 Mo. 343; Doan *v.* The Railway, 38 Mo. App. 408; McCullough *v.* The Railway, 34 Mo. App. 23; Smith *v.* The Railway, 112 Mo. App. 610, 87 S. W. Rep. 9; Griffin *v.* Railroad Co., —— Mo. App. ——, 91 S. W. Rep. 1015.

Montana: Nelson *v.* The Railway, 28 Mont. 297, 72 Pac. Rep. 642, citing Hutchinson on Carr.

Nebraska: Atchison, etc. R. R. Co. *v.* Washburn, 5 Neb. 117; Railroad Co. *v.* Lawler, 40 Neb. 356; 58 N. W. Rep. 968; Railway Co. *v.* Witty, 32 Neb. 275, 49 N. W. Rep. 183, 29 Am. St. Rep. 436.

New Hampshire: Hall *v.* Cheney, 36 N. H. 26; Peerless Mfg. Co. *v* Railroad Co., —— N. H. ——, 61 Atl. Rep. 511.

New Jersey: Paul *v.* The Railroad, 70 N. J. Law 442, 57 Atl. Rep. 139; Russell *v.* The Railroad, 70 N. J. Law 808, 59, Atl. Rep. 150, 67 L. R. A. 433.

North Carolina: Swindler *v.* Hilliard, 2 Rich. 286; Smith *v.* The Railroad, 64 N. Car. 235; Branch

liability arising from or caused by negligence of every degree. In others they are permitted to contract for exemption from liability arising from negligence of every degree excepting that which is characterized as gross or willful. But all of the courts

v. The Railroad, 88 N. Car. 573; Gardner *v.* The Railway, 127 N. Car. 293, 37 S. E. Rep. 328; Everett *v.* The Railroad, 138 N. Car. 68, 50 S. E. Rep. 557, 1 L. R. A. (N. S.) 985.

Ohio: Jones *v.* Vorhies, 10 Ohio, 145; Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 Ohio St. 362; Wilson *v.* Hamilton, 4 Ohio St. 722; Welsh *v.* The Railroad, 10 Ohio St. 65; Railroad Co. *v.* Curran, 19 Ohio St. 1; Knowlton *v.* The Railroad, 19 Ohio St. 260; Cincinnati, etc. R. Co. *v.* Pontius, 19 Ohio St. 221; Union Ex. Co. *v.* Graham, 26 Ohio St. 595; Railroad Co. *v.* Sheppard, 56 Ohio St. 69, 46 N. E. Rep. 61, 60 Am. St. Rep. 732.

Pennsylvania: Camden, etc. R. R. *v.* Baldauf, 16 Penn. St. 67; Goldey *v.* The Railroad, 30 Penn. St. 242; Penn., etc. R. R. *v.* Henderson, 51 Penn. St. 315; Farnham *v.* The Railroad, 55 Penn. St. 53; Empire T. Co. *v.* Oil Co., 63 Penn. St. 14; Colton *v.* The Railroad, 67 Penn. St. 211; American Ex. Co. *v.* Bank, 69 Pa. St. 394; Pennsylvania R. Co. *v.* Weiller, (Penn. St.), 19 Atl. Rep. 702; Grogan *v.* Express Co., 114 Penn. St. 523; Buck *v.* The Railroad, 150 Penn. St. 170, 24 Atl. Rep. 678, 30 Am. St. Rep. 800; Armstrong *v.* Express Co., 159 Penn. St. 640, 28 Atl. Rep. 448; Willock *v.* The Railroad, 166 Penn. St. 184, 30 Atl. Rep. 948, 45 Am. St. Rep. 674, 27 L R. A. 228.

South Carolina: Wallingford *v.* The Railroad, 26 S. Car. 258.

Tennessee: Coward *v.* The Railroad, 16 Lea, 225.

Texas: Southern Pac. Ry. Co. *v.* Maddox, 75 Tex. 300; Good *v.* The Railway, (Tex.) 11 S. W. Rep. 854; Railway Co. *v.* Williams, (Tex. Civ. App.) 31 S. W. Rep. 556; Southern Pac. Co. *v.* Phillipson, (Tex. Civ. App.) 39 S. W. Rep. 958, citing Hutchinson on Carr; San Antonio, etc. Ry. Co. *v.* Dolan, (Tex. Civ. App.) 85 S. W. Rep. 302.

Virginia: Virginia & Tennessee R. R. *v.* Sayers, 26 Gratt. 328; Richmond, etc. R. Co. *v.* Payne, 86 Va. 481, 10 S. E. Rep. 749.

West Virginia: Bosley *v.* The Railroad, 54 W. Va. 563, 46 S. E. Rep. 613, 66 L. R. A. 871.

Wisconsin: Schaller *v.* The Railway, 97 Wis. 31, 71 N. W. Rep. 1042; Lamb *v.* The Railway, 101 Wis. 138, 76 N. W. Rep. 1123; Densmore Commission Co. *v.* The Railway, 101 Wis. 563, 77 N. W. Rep. 904; Courteen *v.* Kanawha Dispatch, 110 Wis. 610, 86 N. W. Rep. 176, 55 L. R. A. 182; Nevius *v.* The Railway, 124 Wis. 313, 102 N. W. Rep. 489.

In Willock *v.* The Railroad, 166 Penn. St. 184, 30 Atl. Rep. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228, Williams, J., said: "A common carrier is bound to employ safe and sufficient means of carriage, trustworthy and competent servants, and by himself and his

agree that the contract for such an exemption, to be effective, must contain clear and distinct expressions for that purpose, and mere general terms of exemption, such as that the carrier "shall not be held liable for loss or damage," will not be construed as extending to loss or damage by negligence. In other words, the exemption from liability for negligence must be express by the use of the word itself or of something equivalent; and in construing the terms of such contracts, where the claim is that such an exemption has been agreed to, the words will be taken most strongly against the carrier whose language they are and who is in an advantageous position for dictating the contract.[25]

Sec. 452. (§ 262.) Same subject—The rule of the United States supreme court.—This subject was before the supreme

agents to exercise an intelligent supervision over the system of carriage which he employs. He is, therefore, to all intents and purposes, an insurer against such perils of transportation as it is his duty to provide against, and these include all the perils of the journey except such as arise from the act of God or the king's enemies. Our forefathers brought this definition of the duties of a common carrier with them when they came to this continent, and its outlines remain substantially the same to this day. Some limitations upon this common law liability have been sustained to protect the carrier against unjust and fraudulent claims on the part of customers, but the measure of care due from him to those whom he serves has not been abated in the slightest degree. He must not be negligent. It is against public policy that he should be. A stipulation, therefore, intended to protect him in the violation of his contract as a carrier, and in disregarding a settled principle of public policy, will not be sustained. In contracts attempting to limit the liability of the carrier, the carrier and the shipper are the ostensible parties, but the public, as represented by the courts of law, is the third party and may refuse its consent to stipulations on which carrier and shipper have agreed. When such a contract comes before the courts, the question is not what terms the parties have incorporated into their agreement, but are the terms so incorporated just and reasonable so that they ought on grounds of public policy to be enforced. In determining this question, the courts have been constrained to apply common-law principles and hold that to be just or unjust which was so at common law."

25. Belger *v.* Dinsmore, 51 N. Y. 166; Magnin *v.* Dinsmore, 56 *id.* 168; Steers *v.* The Steamship Co., 57 *id.* 1; Westcott *v.* Fargo, 61 *id.*

court of the United States in the case of Railroad Company *v.* Lockwood.[26] The facts of the case were that the plaintiff, a drover, had signed an agreement to take all risk of injury to his cattle and of personal injury to himself, and had thereupon received what was denominated a pass, one of the conditions printed upon which was, that it was to be considered a waiver of all claims for injuries or damages received on the train. He was injured whilst traveling upon the road under this agreement, and brought suit against the railroad company to recover for the injury received. Evidence being given to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, they contended that they were exempt by the terms of their contract from re-

542; Blair *v.* The Railroad, 66 *id.* 313; Western T. Co. *v.* Newhall, 24 Ill. 466; Adams Ex. Co. *v.* Haynes, 42 *id.* 89; Ill. Cent. R. R. *v.* Read, 37 *id.* 484; Adams Ex. Co. *v.* Stettaners, 61 *id.* 184; Bal. & O. R. R. *v.* Brady, 32 Md. 333; Hale *v.* N. J. etc. Co., 15 Conn. 539; Peck *v.* Weeks, 34 *id.* 145; Lawrence *v.* Railroad, 36 *id.* 63; Kimball *v.* Railroad, 26 Vt. 247; Mann *v.* Birchard, 40 *id.* 326; Higgins *v.* The Railroad, 28 La. Ann. 133; Hawkins *v.* Railroad, 17 Mich. 57; R. R. *v.* Hawkins, 18 *id.* 427; Kinney *v.* Railroad, 3 Vroom, 407; French *v.* Railroad, 4 Keyes, 108; Zimmer *v.* The Railroad, 137 N. Y. 460, 33 N. E. Rep. 642, *affirming* 16 N. Y. Supp. 631, 62 Hun, 619; Giles *v.* Fargo, 17 N. Y. Supp. 476; Morris *v.* Wier, 46 N. Y. Supp. 413, 20 Misc. 586; Security Trust Co. *v.* Express Co., 80 N. Y. Supp. 830, 81 App. Div. 426; *affirmed without opinion in* 178 N. Y. 620, 70 N. E. Rep. 1109; Steamship Co. *v.* Pilkington, (Canada) 28 S. C. R. 146; Isham *v.* Erie R. Co., 98 N. Y. Supp. 609.

General words of exemption from liability for damage will not operate to relieve the carrier from the consequences of negligence. Rieser *v.* Metropolitan Express Co., 91 N. Y. Supp. 170, 45 Misc. 632. A contract for the shipment of live stock exempted the carrier from liability excepting for fraud or gross negligence. It was held that such a contract was neither unreasonable nor illegal. Cooper *v.* The Railroad, 110 Ga. 659, 36 S. E. Rep. 240.

A limitation in a contract based upon a reduced rate that baggage must be at owner's risk against all casualties is valid and will be enforced. Dixon *v.* Navigation Co., (Canada), 18 S. C. R. 704. But a clause in a bill of lading exempting the carrier from liability for his own negligence will not extend to or include cases of either unjustifiable destruction or conversion of the goods. Wilson *v.* Canadian Development Co., (Canada), 33 S. C. R. 432.

26. 17 Wall. 357.

sponsibility for all accidents, including those occurring from negligence, at least from the ordinary negligence of their servants, and requested the judge at the trial to so charge. Their request being refused, and the verdict having gone against them, they appealed to the supreme court, which, after a most careful examination of the principal authorities, both English and American, reached the conclusions, as announced in its opinion: First, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. Secondly, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. Thirdly, that these rules apply both to carriers of goods and carriers of passengers, and with special force to the latter. Fourthly, that a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire. The rule laid down in the Lockwood Case has been reviewed and fully approved in later cases in the same court.[27]

27. Speaking of the Lockwood case in the case of Liverpool, etc. Steamship Co. *v.* Phenix Ins. Co., 129 U. S. 397, in which the rule of the Lockwood case was emphatically approved, Mr. Justice Gray says: "The course of reasoning, supported by elaborate argument and illustration, and by copious references to authorities, by which those conclusions were reached, may be summed up as follows:

"By the common law of England and America before the declaration of independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many states of the Union, common carriers could not stipulate for immunity for their own or their servants' negligence. The English Railway and Canal Traffic Act of 1854, declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the court or judge before whom the case should be tried to be just and reasonable, was substantially a return to the rule of the common law. The only important modification by the congress of the United States of the previously existing law on this subject is the act of 1851, to limit the liability of ship-owners (Act March 3, 1851, ch. 43, 9 St. 635; Rev. St. §§ 4282-4289), and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or

Sec. 453. (§ 263.) Same subject—This rule the prevailing one.—These conclusions, after so thorough an examination of the subject, may be said to have most decidedly turned the scale in favor of the exclusion of all contracts between carriers and their employers, exempting the former from the consequences

misconduct of the master and crew. The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of those responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character. The fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods by charging the common carrier as an insurer, and in regard to passengers by exacting the highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment. Nor can those duties be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants. The law demands of the carrier carefulness and diligence in performing the service; not merely an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law. The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents, and in most cases he has no alternative but to do this or to abandon his business. Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or

of the negligence, of every grade, of themselves or their employees or servants. And, except in those states in which a contrary rule has been too firmly established to be now departed from, considerations of advantage from uniformity upon

from dangers of navigation that no human skill and diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged, unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment. It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care and diligence, or which, in other words, will excuse it from negligence in the performance of its duty, the company remains liable for such negligence. This analysis of the opinion in Railroad Co. *v.* Lockwood shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void. And such has always been the understanding of this court, expressed in several later cases. Express Co. *v.* Caldwell, 21 Wall. 264, 268; Railroad Co. *v.* Pratt, 22 Wall. 123, 134; Bank *v.* Express Co., 93 U. S. 174, 183; Railway Co. *v.* Stevens, 95 U. S. 655; Hart *v.* Railroad Co., 112 U. S. 331, 338; Insurance Co. *v.* Transportation Co., 117 U. S. 312, 322; Inman *v.* Railway Co., 129 U. S. 128."

See to same effect, The Kensington, 183 U. S. 263, *reversing* 94 Fed. 885, 36 C. C. A. 533; Galt *v.* Express Co., 4 MacArth. 124; Campania de Navigacion la Flecha *v.* Brauer, 168 U. S. 104, 18 Sup. Ct. Rep. 12, 42 L. Ed. 398, *affirming* 66 Fed. 777, 35 U. S. App. 44 and 61 Fed. 860; Calderon *v.* Steamship Co., 170 U. S. 272, *reversing* 69 Fed. 574, 16 C. C. A. 332, 35 U. S. App. 587; Railroad Co. *v.* Hughes, 191 U. S. 477, 24 Sup. Ct. R. 132, 48 L. Ed. 268; Cau *v.* The Railway, 194 U. S. 427, 24 Sup. Ct. R. 663, 48 L. Ed. 1053, *affirming* 113 Fed. 91, 51 C. C. A. 76; Doyle *v.* The Railroad, 126 Fed. 841; Saunders *v.* The Railway, 128 Fed. 15, 62 C. C. A. 523.

Any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage from the negligence of himself or his servants is void as against public policy, as an attempt to put off the essential duties resting upon every public carrier by virtue of his employment, and as an attempt to defeat the fundamental principle upon which the law of common carriers is established. Railway Co. *v.* Solan, 169 U. S. 133.

a question of so much importance, and of public policy, together with the weight of authority in its favor as a mere question if law, will perhaps induce its universal adoption as a rule of law in this country.

Sec. 454. (§ 264.) Same subject—Contrary rule prevails in New York.—The court of appeals of New York have, however, come to a different conclusion from that arrived at in the above case by the supreme court of the United States, and in a series of cases, all against the same defendant and resting upon the validity and effect of similar drovers' passes, as they are called, have held that the company had the power to stipulate for exemption from responsibility for injury to such passengers caused even by the gross negligence of its agents.[1] These cases are commented on and disapproved in the case of Lockwood; but since the decision of the supreme court in the latter case, the appellate court of New York has adhered in the most unqualified terms to its former ruling, that the carrier may by contract relieve himself from responsibility for the negligence of every degree of its agents and servants; and this is now the settled law of that state;[2] and in this it accords with the long established English law. The highest court of that state has expressly refused to follow the rulings of the United States supreme court upon this question as not binding upon the state courts.[3] But in all these cases it is held that the language of the contract, to protect the carrier from the consequences of his negligence, must have clear, direct and unmistakable reference to the subject of negligence; and where its language was that the carrier "should not be liable for the loss or damage of any box, package or thing for over fifty dollars unless the true value be stated," it was held that there was

1. Smith *v.* N. Y. Cent. R. R., 24 N. Y. 222; Bissell *v.* N. Y. Cent. R. R., 25 *id.* 442; Poucher *v.* N. Y. Cent. R. R., 49 *id.* 263.

2. Magnin *v.* Dinsmore, 56 N. Y. 168; Westcott *v.* Fargo, 61 *id.* 542; Zimmer *v.* Railroad Co., 62 Hun, 619, 16 N. Y. Supp. 631, *affirmed*, 137 N. Y. 460, 33 N. E. Rep. 642; Campe *v.* Weir, 58 N. Y. Supp. 1082, 28 Misc. Rep. 243.

3. Mynard *v.* Railroad, 7 Hun, 399; 71 N. Y. 180.

not in its phraseology any such clear and distinct expression of exemption from loss by negligence as the law required.[4]

Sec. 455. Same subject—Rule in Illinois.—According to the decisions of the courts of Illinois the carrier is permitted to contract against liability for the acts or omissions of himself or his servants, providing they are not of such a character as to amount to gross negligence. But since it is held that gross negligence is a failure to exercise ordinary care in view of the circumstances of the particular case, contracts which operate to exempt the carrier from liability where he has failed to exercise ordinary care in the transaction of his business as a common carrier are considered unreasonable;[5] and where there is some evidence of negligence adduced, the question whether it was gross in character is held to be one of fact for the jury.[6]

Sec. 456. Same subject—Stipulation as to amount of proof required.—A stipulation in the contract of shipment which provides that the carrier will not be liable for losses resulting from certain causes, unless it shall affirmatively appear and without presumption be proven that the loss was caused by negligence, being, in effect, an attempt by the carrier to relieve himself from liability for losses occasioned by his negligence

4. Magnin *v.* Dinsmore, 56 N. Y. 168; Westcott *v.* Fargo, 61 *id.* 542. See also, Canfield *v.* Railroad Co., 93 N. Y. 532; Holsapple *v.* Railroad Co., 86 N. Y. 275; Galloway *v.* Railroad Co., 95 N. Y. Supp. 17, 107 App. Div. 210.

5. Western T. Co. *v.* Newhall, 24 Ill. 466; Adams Ex. Co. *v.* Haynes, 42 Ill. 89; Ill. Cent. R. R. *v.* Read, 37 Ill. 484; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184; Arnold *v.* The Railroad, 9 Chicago Legal News, 211; Railroad Co. *v.* Grimes, 71 Ill. App. 397; Railroad Co. *v.* Miller, 79 Ill. App. 473; Express Co. *v.* Council, 84 Ill. App. 491; Express Co. *v.* Burke, 94 Ill. App. 29; *s. c.* 87 Ill. App. 505; Railroad Co. *v.* Ross, 105 Ill. App. 54; Wabash, etc. R. Co. *v.* Brown, 152 Ill. 484, 39 N. E. Rep. 273, *affirming* 51 Ill. App. 656. In the Railroad Co. *v.* Fox, 113 Ill. App. 180, it was said by the court that a more comprehensive statement of the rule laid down in the Arnold case, *supra*, namely, that the carrier could exempt himself from liability for negligence when it was not gross or willful, would be that the carrier could not contract for exemption from responsibility for a failure on his part, or that of his servants, to exercise ordinary care in the transaction of his business.

6. Wabash, etc. R. Co. *v.* Brown, 152 Ill. 484, 39 N. E. Rep. 273.

where the proof fails to come up to the standard required, will be considered as an evasion of the law and of no effect in exonerating him from liability for losses occasioned by his negligence.[7]

Sec. 457. (§ 265.) Power of an agent to bind the owner of goods to limitation.—If the owner of the goods intrusts them to another for the purpose of having them delivered to the carrier for transportation, the person to whom they are so intrusted will be presumed to have authority to agree with the carrier upon the terms of shipment; and this authority will include the right to enter into a reasonable agreement on behalf of the owner restricting the carrier's liability as an insurer. And where the carrier is without knowledge that the person to whom the goods are so intrusted has no authority to enter into a contract restricting the carrier's common law liability, the mere acceptance by the latter of the carrier's receipt will operate to bind the owner of the goods to its lawful limitations. This is well illustrated by the case of Nelson *v.* The Railroad.[8] The plaintiff had purchased a large mirror, and gave instructions to the party from whom he had purchased it as his agent to forward it to him by defendant railroad company. The agent sent it to the depot of the road by a carman, who delivered it and received from the agent of the road a receipt, with a provision in it releasing the company from any liability for damage or loss by reason of breakage. This receipt was taken by the carman to the plaintiff's agent, who retained it without objection. The mirror was transported to destination with ordinary care, but on arrival there was found to be broken. The receipt was held, under those circumstances, to constitute a binding contract between the company and the plaintiff. So in Squire *v.*

7. Cox *v.* The Railroad, 170 Mass. 129, 49 N. E. Rep. 97.

8. 48 N. Y. 498. See also, Waldron *v.* Fargo, 170 N. Y. 130, 62 N. E. Rep. 1077, *reversing* 64 N. Y. Supp. 798; Zimmer *v.* The Railroad, 137 N. Y. 460, 33 N. E. Rep. 642; Root *v.* The Railroad, 83 Hun, 111; 31 N. Y. Supp. 357; *s. c.* 27 N. Y. Supp. 611, 76 Hun, 23; Brown *v.* The Railroad, 36 Ill. App. 140.

Railroad,[9] the plaintiff, who had become the purchaser of hogs, sent a drover to take care of them and to transport them by railroad. The ticket-master of the road gave the drover a pass, and handed to him at the same time a written contract to be signed by him with the name of the plaintiff, which was done by the drover. This contract limited the liability of the company in several important particulars, and, among other things, exempted it from liability for injury to the hogs by suffocation. A number of them were suffocated before reaching their destination, and the plaintiff brought suit to recover their value; but it was held that the contract was binding upon him and that the company was not liable. In York Company *v.* Central Railroad,[10] the agent of the plaintiffs accepted a bill of lading relieving the defendant carrier from liability for loss by fire. The goods were destroyed whilst in transit, by fire, and it was held that the plaintiffs could not recover, the stipulation in the receipt excepting liability for loss from that cause being binding

9. 98 Mass. 239.

A contract between the agent of the owner of the goods and the carrier is not affected by a secret limitation of the agent's authority to agree to terms of limitation. Smith *v.* Robinson Bros., Lumber Co., 34 N. Y. Supp. 518.

In California Powder Works *v.* The Railroad, 113 Cal. 329, 45 Pac. Rep. 691, 36 L. R. A. 648, the plaintiff, a powder manufacturer, employed at different times a common drayman to haul quantities of powder from a certain depot to the depot of the defendant. It was customary for the drayman, when delivering the powder to the defendant's agent, to sign a form of shipping order in which terms were inserted to the effect that the carrier would not be liable for loss by fire from any cause. The plaintiff had no knowledge of the drayman's practice of signing its name to the shipping orders since the orders, after being signed, were retained by the carrier; nor had the drayman any actual authority to do so. During the transit of a quantity of powder which the defendant had accepted under a shipping order signed in the usual manner by the drayman, the powder exploded, entailing a loss of the entire shipment. The plaintiff contended that the drayman had no actual or implied authority to bind it by signing its name to a contract to the terms of which it had never agreed. It was held that the drayman, having had authority to ship the powder for the plaintiff, had a general and implied authority to agree with the carrier with respect to the terms upon which the goods were to be shipped, and that the plaintiff was without remedy.

10. 3 Wall. 107.

upon them.[11] And in Armstrong *v.* Railway Company,[12] it appeared that the plaintiff's agent, who was sent by the shipper of live stock to care for the stock during transportation, entered into a contract with the connecting carrier for the carriage of the stock to destination. The contract contained a clause limiting the time within which a written claim for damage or loss should be filed with the carrier. The stock was injured while on the journey but no claim was filed within the time agreed upon. It was held that the plaintiff was bound by the act of his agent and was accordingly precluded from the right to maintain an action.

Sec. 458. (§ 266.) Same subject.—And not only has the agent for shipment the authority to deliver the goods and to accept the carrier's receipt, but whenever it becomes his duty to send or to forward them, it is his duty also to accept such terms of the carrier as may not be unreasonable, if necessary to procure the acceptance of the goods by him; and if he be a paid agent to have them carried, he would become responsible for any damage which might occur to them in consequence of his failure, and it would be no defense that he had no authority to deliver the goods upon such terms. In Rawson *v.* Holland[13]

11. Christenson *v.* Am. Ex. Co., 15 Minn. 270; Briggs *v.* Railroad, 6 Allen, 246; Mills *v.* Railroad, 45 N. Y. 622; Shelton *v.* Merchants' D. T. Co., 59 *id.* 258; Barnett *v.* Railway Co., 5 Hurl. & Nor. 604; Moriarty *v.* Harnden's Ex., 1 Daly, 227; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; Robinson *v.* Merchants' Des. T. Co., 45 Iowa, 470.

Upon question of agent's authority to bind the owner by contract limiting the carrier's liability, see Southern Pac. Ry. Co. *v.* Maddox, 75 Tex. 300.

12. 53 Minn. 183, 54 N. W. Rep. 1059, citing Hutchinson on Carr.

The general rule of agency that the principal who adopts the act of one professing to act for him must adopt it *in toto*, and will not be permitted to claim the benefits therefrom and at the same time repudiate the burdens thereof, applies to a shipping contract containing limitations of liability which has been entered into by an agent and adopted by the principal. Adams Express Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. Rep. 245, 64 N. E. Rep. 647, 94 Am. St. Rep. 279, citing Hutchinson on Carr.

13. 59 N. Y. 611.

The general course of business of forwarding goods when the ship of the signer of a through

the carrier, an express company, transported the goods to the end of its own route, but failed to offer or deliver them to the next succeeding carrier on the route to destination, because it required the express company, as a condition precedent to its acceptance of the goods, to sign a contract containing various restrictions and limitations of its liability. This the express company declined to do, but stored the goods in its warehouse and notified their owners of the fact and awaited instructions from them. Before any such instructions were received, and after the goods had remained thus stored for about twenty days, they were consumed by fire. The carrier was held liable because, having contracted to forward the goods from the end of its own route, and being therefore the agent of the owners for that purpose, it had the power to sign the contract, and it was its duty to have done so and forwarded the goods. The detention was said to have been inexcusable, and the loss having occurred from the fault of the express company, it was responsible, although in its receipt for the goods it had contracted for exemption from liability for loss by fire.

Sec. 459. Same subject—How where carrier has notice that authority of agent is restricted.—Where, however, the carrier has notice that the agent is without authority to bind the owner by a contract containing limitations of liability, or where a contract has been previously entered into between the owner and the carrier without reference to terms of limitation, the

bill of lading does not go all the way to the port of ultimate destination, of which fact the through bill of lading gives notice, and the manifest necessity of the case that the through undertaker should tranship under such a contract as he can reasonably make, justifies the presumption of the requisite authority, in the absence of any want of notice thereof brought to the knowledge of the second carrier, to enter into such a contract. If, therefore, the second contract contains exemptions from liability not contained in the through contract, and loss occur on the route of the second carrier from one of such excepted causes, the shipper will not be permitted to question the authority of the first carrier to enter into the second contract with the connecting carrier and must seek his remedy against the first carrier under the through contract. The St. Hubert, 107 Fed. 727, 46 C. C. A. 603, *affirming* 102 Fed. 362.

acceptance of a receipt by the agent, or the signing by him of a bill of lading, cannot operate to bind the owner to terms of limitation which may be included in such receipt or bill of lading.[14] But if the owner, with full knowledge of the facts, adopts the act of his agent, such conduct will be tantamount to an original authority to the agent to agree to the terms proposed, and the owner will be concluded by the agreement as made by the agent. In Russell *v.* The Railroad,[15] it appeared that a storage company, in accordance with the plaintiff's directions, delivered to the defendant for transportation a box containing household goods of the value of $300. The storage company made out a freight bill on one of the printed forms of the defendant company and inserted therein the directions as to shipment. No mention was made in the freight bill of sending the box forward under a contract limiting the defendant's liability. The storage company gave the box and freight bill to their cartman for delivery to the defendant and instructed him to pay the freight charges and secure a copy of the bill of lading. No directions were given to the cartman in respect to the rate of freight he was to pay. On receipt of the box by the defendant, it issued to the cartman a bill of lading which contained a clause limiting its liability in case of loss to $5.00 for each hundred pounds, and the reduced rate of freight usually charged under such contracts was paid by the cartman. The box was lost, and suit being brought to recover its full value, the defendant relied upon the contract as evidenced by the bill of lading delivered to the cartman. It was held that while ordinarily where a person is intrusted with goods for the purpose of delivering them to a carrier for shipment, such person is presumed to have authority to enter into an agreement limiting the carrier's liability, if the carrier knows that his authority is restricted, the acceptance by

14. Russell *v.* The Railroad, 70 N. J. Law 808, 59 Atl. Rep. 150, 67 L. R. A. 433; Jennings *v.* The Railway, 127 N. Y. 438, 28 N. E. Rep. 394, *affirming* 52 Hun, 227, 5 N. Y. Supp. 140; Railway Co. *v.* Hamlin, 42 Ill. App. 441.

15. 70 N. J. Law 808, 59 Atl. Rep. 150, 67 L. R. A. 433. See also, Hailparn *v.* Joy S. S. Co., 99 N. Y. Supp. 464.

him of a receipt in which limitations of liability are inserted will amount to no more than an *ex parte* proposition on the part of the carrier and the owner will not be bound by its terms; that since the box, together with the shipping order containing the shipping directions, were offered to the defendant and no mention was made in the shipping order of sending the box under a limited liability contract, it was the defendant's duty to have accepted the box on the terms stated in the shipping order which was ample notice to the defendant that the cartman's authority was in no sense discretionary, and that the agreement entered into with the cartman could not avail the carrier.

Sec. 460. (§ 267.) Powers of agents of carriers to bind them by contract.—Where carriers transact their business through agents, either general or local, it is equally competent for such agents to bind them by such contracts as the public have a right to suppose they are authorized to make from the manner in which they are employed or are seemingly intrusted by their principals; and, as most of the carrying business is now done by corporations, which can act only through the instrumentality of agents, it is necessary for the protection of those who have goods to send by them that this should be so.[16]

16. A shipping agent of a common carrier has general authority to make all contracts of shipment. Any undisclosed limitation upon such agent's authority will not be binding on the shipper. Only when contracts are of an unusual and extraordinary character is the shipper to put to inquiry as to the agent's authority. Such an agent, therefore, may agree to deliver the shipper's goods by a certain time, and when the shipper and the carrier through its agent agree upon a date of delivery at destination which gives the usual time to make the trip, such contract cannot be held unusual or extraordinary, and is within the general authority of the agent. The carrying business of the country is mostly done by corporations which act through agents, and when the contract is a reasonable one, it will be upheld in the absence of notice that the agent was without authority. Rudell *v.* Transit Co., 117 Mich. 568, 76 N. W. Rep. 380, 44 L. R. A. 415, citing Hutchinson on Carr.

Although an unauthorized agent may make a parol agreement for the shipment of goods, if an authorized agent later accepts the goods under such agreement with-

Whenever the claim is made by the carrier that his liability has been limited by a contract, there could never be, of course, ground for disputing the authority of his agent. If the shipper has assented to such contract, whether the agent had authority or not, it could be adopted by the carrier and become valid by a subsequent ratification. Consequently, in an action against the carrier, where he defends upon the ground of contract restricting his liability, the authority of his agent to make the contract could never come in question if the sender of the goods had bound himself by an acceptance of the receipt or in any other manner which would make the contract legal and obligatory upon him. But if the agent has undertaken to impose upon the carrier obligations beyond those imposed by law, the question of his authority to do so may become a very serious one in an action to recover for a failure to perform the contract.[17]

Sec. 461. (§ 268.) Same subject—The English rule.—The English rule is that a mere local or station agent, as he is called, may bind the carrier to the performance of contracts beyond the scope of his legal duties. The station agent of a railway company may therefore bind it to carry beyond its own route, although notice may have been given that such railway will be responsible for the carriage only to the extent of its route; and he may bind his principal to carry within a certain time, and even that the goods shall be delivered at destination beyond the line of the road, before a particular hour.[18]

Sec. 462. (§ 269.) Same subject—Implied authority.—Unless some special reasons known to the shipper restrict the general powers of the agent, the public have a right to assume that

out objection, the carrier will be bound by it. Gulf, etc. Ry. Co. *v.* Jackson & Edwards, —— Tex. ——, 89 S. W. Rep. 968, *reversing* (Tex. Civ. App.) 86 S. W. Rep. 47.

17. See *ante*, § 241.

A local agent has no implied authority to bind the carrier by a contract that goods shall be shipped in solid trains, or that each train shall be drawn by a single engine. Gulf, etc. Ry. Co. *v.* Jackson & Edwards, *supra*.

18. Wilson *v.* Railway Co., 18 Eng. L. & Eq. 557; Pickford *v.* Railway Co., 12 M. & W. 766.

the agents of carriers, whether corporations or not, and whether such agents be local or general, have the right to bind such carriers by contracts with their employers in the particular line of business in which they are employed, or are represented or held out as being employed, and within the scope of the business of their principals.[19] Thus, where the defendant was the owner of a line of steamers, and the clerk of his agent, who had been in the habit of giving bills of lading, contracted that certain freight should be carried by a particular boat of the line, though not the next in order of departure, the contract was held binding, and the freight, being sent by another boat, it was

19. Rudell *v.* Transit Co., 117 Mich. 568, 76 N. W. Rep. 380, 44 L. R. A. 415; Trimble *v.* The Railroad, 57 N. Y. Supp. 437, 39 App. Div. 403; *s. c.* 162 N. Y. 84, 56 N. E. Rep. 532, 48 L. R. A. 115; Graves *v.* Steamship Co., 61 N. Y. Supp. 115, 29 Misc. 645.

An agent at a station where a carrier is soliciting freight and quoting freight charges upon shipments has implied authority to include in a contract of affreightment a provision for clearance of customs duties. Waldron *v.* The Railway, 22 Wash. 253, 60 Pac. Rep. 653, citing Hutchinson on Carr.

Unless a shipper has notice that a station agent has no authority to do so, such agent has implied authority to agree to furnish a reasonable number of cars for live stock at a certain date. Railway Co. *v.* Racer, 10 Ind. App. 503, 37 N. E. Rep. 280.

A verbal contract of shipment entered into by a station agent will be binding on the carrier unless the shipper has knowledge that the agent has no authority to enter into such a contract. Railway Co. *v.* Williams, (Tex. Civ. App.) 57 S. W. Rep. 883.

Where two railroad companies with connecting lines unite to form an association or partnership by which each is to receive freight on its own line for shipment over the other, each company is a general agent of the other, and a freight agent of one company has the same authority to make a contract binding on the other company that he has to make a contract binding on his immediate principal. A shipper, therefore, has a right to rely upon this apparent authority, and is not chargeable with notice of special limitations upon an agent's authority to contract for the rates over the line of the other company. Southern Pac. Co. *v.* Duncan, 16 Ky. Law Rep. 119. But a carrier's agent in a foreign state whose duty it is to solicit freight business has no general authority to make rates or to deviate in a particular instance from the terms set out in circulars sent by the carrier to shippers. Lienkauf *v.* Lombard, Ayres & Co., 42 N. Y. Supp. 391, 12 App. Div. 302.

held that the carrier took all the risks of its loss, although the designated vessel may have been withdrawn in the meantime from the route.[20] So a clerk of a carrier authorized to receive goods for transportation has implied power to agree that certain instructions as to their delivery shall go with the goods, and the carrier is liable for a loss occasioned by a failure to do so.[21] A local custom not to make such contracts cannot affect the rights of the shipper, to whom the custom was unknown.[22] So such a clerk *i. e.*, a station agent, has implied authority to agree that a person going in charge of animals may ride in the stock-car.[23] And it has been held in this country that the station agent of a railroad company may bind the company to deliver beyond the terminus of its route and within a fixed time.[24] So in Deming *v.* The Railroad,[25] where the owner of the goods had contracted to deliver them by a certain time, and the station agent of the railroad, aware of that fact, had contracted on behalf of the road that they should be so delivered, the road was held bound for the damages for the non-delivery within the time. But it has also been held in another case that such agent for a railway has no power to bind his company by a contract to forward freight by a passenger train.[26] It has been held also that where the company had furnished blank receipts to its agent which bound the company to transport freight only to points upon its own route or to its terminus, a receipt given by such agents, so altered as to make it a contract by the company to carry beyond its route, was not obligatory upon it, the agent having no power to enter into such contract to perform a duty not enjoined by law and not assumed by notice to the public or in any other authorized manner. And it was said that the English authorities upon the question were of no weight in

20. Goddard *v.* Mallory, 52 Barb. 87; Goodrich *v.* Thompson, 44 N. Y. 324.

21. Hutchings *v.* Ladd, 16 Mich. 493.

22. Hutchings *v.* Ladd, *supra.*

23. Lawson *v.* The Railroad, 64 Wis. 447.

24. Strohn *v.* The Railroad, 23 Wis. 126; Hanson *v.* The Railroad, 73 Wis. 646.

25. 48 N. H. 455.

26. Elkins *v.* The Railroad, 3 Foster, 275.

those states which had refused to follow the rule which prevails there, of putting the responsibility of the carriage throughout to destination upon the receiving carrier, independently of contract.[27] And where the defendant railroad was one of a number of roads which had associated to carry through freight under the name of the "White Line," the receipt of an agent of the association for freight received at an intermediate station was held not to bind the defendant company, as such agent could only bind a member of the line when he contracted about business in which the particular member was interested and bound to assist in performing; and as defendant was not bound as a member of the line to assist in the transportation of freight taken up at an intermediate station, the contract made by the agent was held to be unauthorized.[28]

Sec. 463. (§ 270.) What will be construed as a contract exempting from liability for negligence—Language must be clear.—No contract, however, exempting the carrier from liability for losses or damage occurring from negligence will be implied from doubtful language. To have this effect where allowable at all, the contract must so clearly and explicitly include liability for the consequences of negligence as to leave no doubt of its meaning and intent.[29] The contract must operate according to its terms; but when doubtful terms are employed, the general rule binding common carriers to a stringent liability will determine the construction, because when the carrier insists that an exception has been created in his favor, the burden of

27. Burroughs *v.* Railroad, 100 Mass. 26. See also, Grover & Baker Co. *v.* Railway Co., 70 Mo. 672; White *v.* Railroad Co., 19 Mo. App. 400; Turner *v.* Railroad Co., 20 Mo. App. 632; Crouch *v.* Railroad Co., 42 Mo. App. 248; Patterson *v.* Railroad Co., 47 Mo. App. 570; *s. c.* 56 Mo. App. 657; Minter *v.* Railroad Co., 56 Mo. App. 282.

28. Irwin *v.* The Railroad, 59 N. Y. 653.

29. Nicholas *v.* Railroad Co., 89 N. Y. 370; Mynard *v.* Railroad Co., 71 N. Y. 180; Holsapple *v.* Railroad Co., 86 N. Y. 275; Canfield *v.* Railroad Co., 93 N. Y. 532; Adams Ex. Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. Rep. 245, 64 N. E. Rep. 647, 94 Am. St. Rep. 279; citing Hutchinson on Carr.; Price *v.* Union Lighterage Co., 1 K. B. (1904) 412, 73 L. J. K. B. 222, 20 T. L. R. 177.

showing it rests upon him; and when the terms of the exception are general and can be reasonably satisfied by a limited construction, their meaning will not be extended beyond such reasonable limits. Hence where the agreement between the common carrier and the owner of the goods provided in general terms that they were to be transported at the owner's risk, it was held that the owner assumed the risks arising from the ordinary dangers of transportation by the means employed which the reasonable and ordinary care of the carrier might be insufficient to prevent; but that the carrier was still liable for losses arising from dangers which ordinary care and prudence might have avoided.[30] So the exception in the carrier's receipt of liability for all loss or damage "arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire, or from any cause whatever," was held not to exempt him from liability for losses or damage occurring from his own negligence or that of his servants, the court remarking that "the terms of these contracts are very much under the control of the carriers, and they may justly be required to express in plain terms the entire exemption for which they stipulate. The language of this clause is very broad; but if it be desired that a clause shall cover losses by negligence, it is not too much to say that the purpose must be clearly expressed."[31] It has also been decided that where such contract relieves the carrier from responsibility for losses by fire, he is still liable for such losses, if it appear that they have resulted from his negligence.[32] And where the exemption was from damage or loss from any act, neglect or default of the pilot, master or mariners, it was held that the gross carelessness of the mate in delivering property in port ought not to be deemed within the exception.[33]

30. French *v.* Railroad Co., 4 Keyes (N. Y.) 108; Nashville, etc. R. R. *v.* Jackson, 6 Heisk. 271; Baltimore, etc. R. R. *v.* Rathbone, 1 W. Va. 87; Mobile, etc. R. R. *v.* Jarboe, 41 Ala. 644; Canfield *v.* Railroad Co., 93 N. Y. 532.

31. Magnin *v.* Dinsmore, 56 N. Y., 168; Westcott *v.* Fargo, 6 Lans. 319.

32. Steinweg *v.* Railroad, 43 N. Y. 123; Lamb *v.* Railroad, 46 *id.* 271; Bostwick *v.* Railroad, 45 *id.* 712.

33. Guillaume *v.* Hamburgh, etc. P. Co., 42 N. Y. 212.

Sec. 464. (§ 275.) Contracts limiting liability must be construed strictly against the carrier.—When such contracts between the carrier and his employer depend upon the notices of the carrier or upon terms and conditions which he has put into his receipts, if there be doubt or ambiguity in such notices or in the language of the receipts, it will be solved in favor of the employer and against the carrier.[34] The law is said to be jealous of the duty and obligation of the carrier, and will not allow him to divest himself of them without plain language indicative of an agreement to that effect. The imposition of his duties is not a light thing to be shuffled off at his pleasure. It has been

34. Kansas City, etc. R. Co. *v.* Holland, 68 Miss. 351, 8 So. Rep. 516; Black *v.* Transportation Co., 55 Wis. 319; Little Rock, etc. Ry. Co. *v.* Talbot, 39 Ark. 524; Norman *v.* Binnington, 25 Q. B. Div. 475; Taylor *v.* Steam Co., L. R. 9 Q. B. at p. 549; Burton *v.* English, 12 Q. B. Div. at p. 224; The Caledonia, 157 U. S. 124, 15 Sup. Ct. Rep. 537, 39 L. Ed. 644; Compania De Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 18 Sup. Ct. Rep. 12, 42 L. Ed. 398; Railway Co. *v.* Reiss, 183 U. S. 621, 22 Sup. Ct. R. 53, *affirming* 99 Fed. 1006, 39 C. C. A. 679 and 98 Fed. 533, 39 C. C. A. 149; Fairbank & Co. *v.* Railway Co., 81 Fed. 289, 26 C. C. A. 402, 47 U. S. App. 744, 38 L. R. A. 271, *reversing* 66 Fed. 471; Railroad Co. *v.* Nichols, 85 Fed. 945, 29 C. C. A. 500; Smith *v.* Booth, 122 Fed. 626, 58 C. C. A. 479, *affirming* 110 Fed. 680; Pierce *v.* The Railroad, 120 Cal. 156, 47 Pac. Rep. 874, 52 Pac. Rep. 302, 40 L. R. A. 350, 354; Parker *v.* The Railroad, 133 N. Car. 335, 45 S. E. Rep. 658, 63 L. R. A. 827; Amory Mfg. Co. *v.* The Railway, 89 Tex. 419, 37 S. W. Rep. 856, 59 Am. St. Rep. 65; Welch *v.* The Railway, —— N. Dak. ——, 103 N. W. Rep. 396; Railway Co. *v.* Nicholai, 4 Ind. App. 119, 30 N. E. Rep. 424, 51 Am. St. Rep. 206; Steamship Co. *v.* Pilkington, (Canada) 28 S. C. R. 146.

A provision in a bill of lading that the railroad company, in case of loss, should have the benefit of any insurance that may have been obtained upon the goods was construed to cover loss or damage to the goods themselves, and not damage sustained by reason of a mere failure to carry and deliver the goods at a reasonable time. Klass Commission Co. *v.* The Railroad, 80 Mo. App. 164. So a condition in the contract that the shipper, in case of loss or injury, should give the carrier notice of his claim within a certain time was held not to apply to a claim for damages arising on account of a delay in transportation. Louisville, etc. R. Co. *v.* Bell, 13 Ky. Law Rep. 393; Louisville, etc. R. Co. *v.* Smith, 14 Ky. Law Rep. 814; Leonard *v.* The Railway, 54 Mo. App. 293; *s. c.* 57 Mo. App. 366.

sanctioned by the accumulated wisdom of many years, and can only be laid aside under circumstances which import a clear agreement upon the part of the other party to the contract. Thus, where the carrier had given two notices, he was held to be bound by the one least beneficial to himself.[35] And where he had put up on a board in his office a notice which limited his liability, and had also circulated handbills, proposing to carry on terms of less restricted liability, he was held bound by the latter.[36] So where a bill of lading provided that the carrier would not be liable for loss or damage arising from causes incident to railroad transportation, nor from fire or the elements "while at depots," and the goods were destroyed by fire while in the depot at destination, it was held that since doubtful expressions were to be taken most strongly against the carrier, the words, "while in depots," referred only to the depots at which the cars containing the goods might be stopped and not to the depot at destination.[37] And where a carrier effected an arrangement with a compress company to act as its agent and receive cotton intended for transportation over its route, and it accepted a delivery of cotton at such place instead of at its own depot and issued its ordinary bill of lading therefor which stipulated for exemption from liability for loss by fire while the cotton was in its depots, stations, or places of transshipment, it was held that the exemption was not to be construed as relating to fire in the cotton press.[38] So a clause in a ship's bill of lading which stated that the ship would not be answerable for loss occasioned by latent defects in the machinery or hull of the vessel not resulting from a want of due diligence was held not to cover a condition of unseaworthiness existing at the commencement of

35. Munn *v.* Baker, 2 Starkie, 255.

36. St. Louis, etc. R. R. *v.* Smuck, 49 Ind. 302; Atwood *v.* Trans. Co., 9 Watts, 87; Aiery *v.* Merrill, 2 Curtis, 8; Edsall *v.* Railroad, 50 N. Y. 661.

37. E. O. Standard Milling Co. *v.* Transit Co., 122 Mo. 258, 26 S. W. Rep. 704.

38. Deming *v.* Merchants' Cotton Press & Storage Co., 90 Tenn. (6 Pickle) 306, 17 S. W. Rep. 89, 13 L. R. A. 518.

the voyage, but to apply only to a state of unseaworthiness arising during the voyage.[39]

Sec. 465. (§ 276.) Same subject—Particular exemptions not enlarged by general language.—When the particular dangers or risks against which the carrier has specifically guarded himself in his receipt are followed by more general and comprehensive words of exemption, the latter are to be construed to embrace only occurrences *ejusdem generis* with those previously enumerated, unless there be a clear intent to the contrary. As where the owner of horses who was about to send them by railroad entered into a contract with the company that he would "take all risks of loss, injury, damage or other contingencies in loading, conveyance, unloading and otherwise, whether arising from negligence, default or misconduct, gross or culpable or otherwise, on the part of the railway company's servants, agents or officers," and upon the journey the horses were injured by the bottom of the car in which they were placed giving way, it was held that this defect in the car had no relation to any of the risks assumed by the owner and was not therefore included in them. The contract, it was said, had reference to such risks only as were likely to arise from the nature of the freight, from delays, and

39. The Aggi, 107 Fed. 300, 46 C. C. A. 276, *affirming* 93 Fed. 484.

A stipulation in a contract of affreightment exempting the vessel from liability for loss or damage occasioned by "latent defects in the hull of the vessel" will not extend to such defects as were in existence at the time of the commencement of the voyage. The Sandfield, 92 Fed. 663, 34 C. C. A. 612, *affirming* 79 Fed. 371.

Clauses exempting the owner of the vessel from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and are not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. R. 753, 42 L. C. A. 1181, *reversing* 68 Fed. 254 and 63 Fed. 266. But the breaking of a junk ring on a steamship engine cylinder was held to be "an accident of the sea and of the machinery" within the meaning of an exemption from liability for losses from such dangers. The Curlew, 55 Fed. 1003, 5 C. C. A. 386, 8 U. S. App. 405.

See also, The Maori King *v.* Hughes, 2 Q. B. (1895) 550, 65 L. J. Q. B. 168.

from casualties and defaults occurring during the loading, transportation, unloading and delivery of the horses, but not to risks not incident to the ordinary transaction of business and arising from negligence in no way likely to be incurred by a company using ordinary care in the management of its business.[40] And where the contract was that the shipper of the goods released the carrier "from any and all damages that may occur to the said goods arising from leakage or decay, chafing or breakage, or from any other cause not the result of collision of trains or of cars being thrown from the track while in transit," it was held not to release him from total loss or destruction of the goods by fire.[41]

Sec. 466. Same subject—Construction of specific terms not altered to release carrier.—In the case of Amory Manufacturing Co. *v.* The Railway,[42] it appeared that a quantity of cotton was placed upon the platform of a compress company at the point of shipment for the purpose of being compressed. While the cotton was still on the platform of the compress company, the defendant issued to the shipper its bill of lading by which it agreed to transport the cotton. The bill of lading provided that neither the company issuing the bill of lading nor any connecting carrier would be liable in case of loss by fire while the cotton was in transit, or in depot or place of transshipment, or on landing at the place of delivery. The cotton was destroyed by fire while still upon the platform of the compress company. In an action to recover the value of the cotton, the trial court found that the fire was due to no negligence on the part of the defend-

40. Hawkins *v.* Great W. R'y Co., 17 Mich. 57.

41. Menzell *v.* The Railroad, 1 Dillon 531. See also, Railway Co. *v.* Callender, 183 U. S. 632, 22 Sup. Ct. R. 257, *affirming* 98 Fed. 538, 39 C. C. A. 154; The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. R. 9, 43 L. Ed. 234; *s. c.* 91 Fed. 164, 33 C. C. A. 430, *reversing on other grounds* American Sugar Refining Co. *v.* The G. R. Booth, 64 Fed. 878; The Waikato *v.* New Zealand Shipping Co. (1899), 1 Q. B. 56, 68 L. J. Q. B. 1, 79 Law T. (N. S.) 326; Trainor *v.* Steamship Co. (Canada), 16 S. C. R. 156.

42. 89 Tex. 419, 37 S. W. Rep. 856, 59 Am. St. Rep. 65. See also, Gulf, etc. R'y Co. v. Pepperell Mfg. Co. (Tex. Civ. App.), 37 S. W. Rep. 965.

ant, and held that under the exemption clause of the bill of lading it was not liable. This ruling was affirmed in the court of civil appeals. But the supreme court, in reversing the ruling of the lower court, said: "In order to sustain the ruling of the court of civil appeals and of the trial court, it must be held that the cotton, while upon the platform of the compress company, was either *in transit* or *in depot* within the meaning of those terms as used in the bill of lading. . . . It is contended on the one side that the words *in transit* are the equivalent of the words *in transitu,* and that goods in the hands of a carrier are in transit from the moment of their delivery to him until they reach the hands of the consignee. In a sense, the meaning of the two phrases is the same. The one is a literal translation of the other. But as actually employed, they have a different meaning and application. *In transit* means literally in course of passing from point to point, and such is its common acceptation. Such also is the literal meaning of the phrase *in transitu,* but for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader signification. . . . It would seem, therefore, that if the parties to the contract had desired to employ a single phrase which would cover the carrier's exemption from liability from the time the goods were received by it until it had delivered them to the consignee, they would have used the more comprehensive terms. . . . But here the words *in transit,* the words actually used, according to their ordinary signification, apply only to the cotton from the time the transportation was to begin until it was to end under the contract. The cotton not having been set in motion towards its destination was not in fact in transit, and we cannot hold it constructively in transit while on the platform. . . . It may be true that no satisfactory answer can be given to the question why the defendant should limit its liability from the very moment the transportation began until the delivery of the cotton to the consignee, and it should omit to limit it at its receiving depot. It may be that its intention was to make its exemption general and to contract that it should not be liable for the loss of

the property either while in transit or while at the place it was received. But we hold that the phrase *while in transit* did not exempt the company from the loss of the cotton before the transportation actually began; and in any event, there is such grave doubt as to the construction of the phrase as would require that the doubt should be resolved in favor of the shipper."

Sec. 467. Same subject.—So in De Rothschild *v.* Steam Packet Company,[1] where it appeared that a number of boxes of gold dust were delivered to the defendant by the agent of the plaintiff, to be carried from South America to London, under a bill of lading containing exceptions to the carrier's liability for losses "by the act of God, the queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, roads and rivers of what kind and nature," and the boxes were stolen from a railroad truck in which they had been put after their arrival at Southampton, for conveyance thence to London, it was held that, under the circumstances, and considering the value of the goods, it could never have been intended to relieve the company from responsibility for losses by larceny; and that robbers meant such as might take by force and not those who might take by stealth, and dangers of the roads, if they had reference at all to roads on land, meant only such dangers as the overturning of carriages at rough and precipitous places and could not include theft. And where the carrier limits his liability in reference to specific articles, goods not falling clearly within the description specified will not be included.[2]

Sec. 468. Same subject—Ambiguous words construed against carrier.—In Taylor *v.* Steam Company,[3] it appeared

1. 7 Exch. 734.

2. Cream City R'y *v.* Railway Co., 63 Wis. 93.

An exemption from liability for the negligence of the carrier's servants, collision and other dangers, will not extend to the personal negligence of the carrier himself. The Guildhall, 64 Fed. 867, 26 U. S. App. 414, 12 C. C. A. 445.

A limitation that the value of each horse or mule shipped does not exceed $100, will not apply to a jack shipped under the contract. Richardson *v.* The Railway, 62 Mo. App. 1.

3. L. R. 9 Q. B. 546. See also, Steinman *v.* Angier Line (1891) 1 Q. B. 619, 60 L. J. Q. B. 425.

that five boxes of diamonds had been shipped on one of defendant's steamships under a bill of lading which provided that defendant should not be liable for losses from the act of God, the queen's enemies, pirates, robbers, thieves, barratry of master and mariners, and the like. One box of the diamonds was stolen from the ship, either on the voyage or on her arrival in port before the time for delivery arrived; but there was no evidence to show whether they were stolen by one of the crew or by a passenger, or, after her arrival, by some person from the shore.

"The first question," said Lush, J., "is, does 'thieves' include persons on board the ship, or is it to be limited, as has been held in cases as to policies of insurance, to persons outside the ship and not belonging to it. The word is ambiguous, and, being of doubtful meaning, it must receive such a construction as is most in favor of the shipper, and not such as is most in favor of the ship-owner, for whose benefit the exceptions are framed; for if it was intended to give to it the larger meaning which is now contended for, the intention to give the ship-owner that protection ought to have been expressed in clear and unambiguous language. It is not, I think, reasonable to suppose, when the language used is ambiguous, that it was intended that the ship-owner should not be liable for thefts by one of the crew or persons on board. The ship-owner must protect himself, if he intends this, by the use of unambiguous language. I say nothing as to whether barratry can include theft by one of the crew, because there were passengers on board, and therefore the theft was not necessarily committed by one of the crew, but might have been committed by one of the passengers." The loss was therefore held not to be within the exception.

Sec. 469. Same subject.—But in Spinetti *v.* Steamship Company,[4] two boxes of specie had been shipped under a bill of lading providing that the carrier should not be liable for losses from "theft on land or afloat," "barratry of master or mariners," "any act, neglect or default of the pilot, master, mar-

4. 80 N. Y. 71, *reversing s. c.* 14 Hun. 100.

iners, engineers, servants or agents of the company,'' and others. On the voyage a large sum was abstracted from one of the boxes, and there was evidence tending to show that it had been taken by the purser, and the question was whether the loss was within the exceptions or either of them, and it was held that it was. The purser, the court held, was a mariner, and the loss was within the exception of losses by ''barratry of master or mariners,'' as it ''is well established that the term 'barratry' includes theft and embezzlement by the crew.'' And even if the purser were not a mariner, it was held that the loss fell clearly within the exception of ''theft on land or afloat.''[5]

Sec. 470. (§ 271.) How the benefit of such contracts can be claimed by connecting carriers.—An important question, growing out of the contracts of carriers for limited liability, sometimes arises as to the extent to which they may be taken advantage of by those carriers with whom they are not directly made, but who, as connecting carriers in the line to destination, receive them, directly or indirectly, from the contracting carrier for further transportation. In Maghee *v.* Railroad,[6] the goods were received by a railroad company at Louisville, to be transported thence to New York, ''unavoidable accidents of railroad and fire in depot excepted.'' They were carried by this road to its terminus and thence by other companies to their destination, but after arrival there were burned in the depot of the defendant which had completed their transportation. It was held that the contract made with the first road at Louisville inured to the benefit of all the succeeding carriers. It was said to be reasonable to suppose that the compensation fixed for the carriage had

5. Citing American Ins. Co. *v.* Bryan, 1 Hill. 25; *s. c.* 26 Wend. 563; 1 Phill. on Ins. 1071; Atlantic Ins. Co. *v.* Storrow, 5 Paige 285.

Upon the point that the purser was a "mariner," the court cited *In re* Hayes, 2 Curteis Ec. 338; McLachlan on Shipping, 146, 148; The Gratitudine, 3 C. Rob. 240, 247; The Jane and Matilda, 1 Hagg. Adm. 187, 190; Smith *v.* Sloop Pekin, Gilpin, 203; Bouvier's Law Dict. tit. "Mariner"; Boehm *v.* Combe, 2 Maule & Sel. 172.

6. 45 N. Y. 514. See also, Railway Co. *v.* Sharp, 64 Ark. 115, 40 S W. Rep. 781, citing Hutchinson on Carr.

relation to the restricted liability assumed, and that the contracting company, having undertaken to carry the goods to their ultimate destination, had an interest in making the exception commensurate with the scope and duration of its contract, and that it must be held that all the connecting lines acted under its employment; from which it resulted that all contracts made by the first carrier would inure to their benefit.

Sec. 471. (§ 272.) Same subject.—On the other hand, in Babcock *v.* Railroad[7] the goods were delivered to a company other than the defendant to carry to the terminus of its own route, to be there delivered to a succeeding carrier. After several transfers to successive carriers on their way to destination, the goods finally came into possession of the defendant for continued carriage, and while in its possession they were destroyed by fire, which was one of the excepted risks in the contract of the first company. The question being whether advantage could be taken of this contract by the defendant, it was determined that it could not. The contract, it was said, not being intended as a through contract, no rate of freight was agreed upon for any part of the route beyond the terminus of the first carrier's route, and there was therefore no consideration for an agreement by the plaintiff to relieve the carriers who should thereafter receive the property for transportation from their common-law liabilities, and no such agreement was made. It was admitted that carriers who were not named in the contract for the carriage of goods, and who are not formal parties to it, may, under certain circumstances, have the benefit of it; as when it is made by one of several carriers upon connecting lines or routes, for the carriage of the property over the several routes for an agreed price, by an arrangement among the several lines; or when, in the absence of such an arrangement, one carrier contracts for the carriage of the goods over his own and other lines, which would be a through contract. In all such cases the contract has respect to and provides for the services of the carriers upon the connecting routes. But where there is no such con-

7. 49 N. Y. 491.

tract for the entire transportation, but merely an agreement to carry to the end of its own line and there deliver to the succeeding carrier, the contracting carrier is understood to provide only for himself, and those who succeed him take the goods as though no contract whatever had been made. The connecting carrier in such a case is not only a stranger to the contract but to its consideration. There can be no presumption that there has been on his part any abatement of his charges, as a consideration for exemption from liability on the part of the owner of the goods; and there being no express contract with him the law will not imply one for his benefit.[8]

Sec. 472. (§ 273.) Same subject—Limitation inures to benefit of connecting carrier only when contract for through carriage exists.—The reasons upon which these decisions are based are obvious. When the carrier has undertaken to convey only to the end of his own route, and there to deliver to the succeeding carrier for further carriage, he is a carrier only for his own route, and a forwarder only by the next succeeding carrier, as agent for the owner of the goods. He has no interest in the further transportation, and any contract as to liability which he may have made is to be understood as only co-extensive with his obligation, unless expressly stipulated otherwise. The succeeding carriers are in no wise his agents, but carry for the owner of the goods, and cannot claim the benefit of immunities for which he contracted.[9]

But when he undertakes for the conveyance to destination, his responsibility continues throughout the transit. The succeeding carriers are but his agents, and as such are entitled for their protection to the benefit of all contracts made with their principal. Hence it follows that whenever the carrier is bound by his

8. Merchants' D. T. Co. *v.* Bolles, 80 Ill. 473; Manhattan Oil Co. *v.* Railroad, 54 N. Y. 197; Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; Bancroft *v.* Transportation Co., 47 Iowa, 262.

9. See cases cited in preceding sections, 470, 471. See also, Western, etc. R. Co. *v.* Cotton Mills, 81 Ga. 522; Robinson *v.* Steamship Co., 71 N. Y. Supp. 424, 63 App. Div. 211; *s. c.* affirmed without opinion, 177 N. Y. 565, 69 N. E. Rep. 1130.

contract or by law to carry the goods to the place of their consignment, all carriers who engage in the transportation for any portion of the route are entitled to all the protection which the first carrier has secured by his contract with the shipper.[10] Whenever, therefore, as in England and in many of the states of this country, upon the delivery of goods to a common carrier, consigned to a particular point, the law obliges him to become responsible for the carriage to that place, all subsequent carriers who may be employed to aid in the through transportation do so as agents of the carrier to whom they are first delivered, and are protected by his contracts.[11] By the English law, as we have seen, the question could never arise, because the right of action in such cases would be confined to the first company.[12]

Sec. 473. (§ 274.) Same subject.—The American courts, as we have seen, have not confined the right of action to the carrier upon whom rests the responsibility of the entire transportation where more lines than one have to be traversed by the goods to reach destination, whether that responsibility arises by contract or is forced upon him by construction of law; so that even those

10. See cases cited in §§ 470, 471. See also, Adams Ex. Co. *v.* Harris, 120 Ind. 73; Taylor *v.* Railroad Co., 39 Ark. 148; Whitworth *v.* Railway Co., 87 N. Y. 414; Kiff *v.* Railroad Co., 32 Kan. 263; Bird *v.* The Railway, 99 Tenn. 719, 42 S. W. Rep. 451, 63 Am. St. Rep. 856, citing Hutchinson on Carr.; White *v.* Weir, 53 N. Y. Supp. 465, 33 App. Div. 145; Railway Co. *v.* Viers, 24 Ky. Law Rep. 356, 68 S. W. Rep. 469; Mears *v.* The Railroad, 75 Conn. 171, 52 Atl. Rep. 610, 96 Am. St. Rep. 192, 56 L. R. A. 884; Railroad Co. *v.* Bridger, 94 Ga. 471, 20 S. E. Rep. 349; Railway Co. *v.* Sales (Canada), 26 S. C. R. 663. In Browning *v.* Transportation Co., 78 Wis. 391, 47 N. W. Rep. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415, an express company delivered a receipt to a shipper which contained a stipulation exempting itself from liability except for fraud or gross negligence. It was further provided that such stipulation should inure to the benefit of any connecting carrier. A connecting carrier, in receiving the goods, made out a new and different contract from that contained in the first carrier's receipt. It was held that by so doing it could no longer claim the benefit of the stipulation in the first contract.

11. *Ante*, § 225.

12. Wilby *v.* Railway Co., 2 Hurl. & N. 703; Mytton *v.* Railway Co., 4 *id.* 615; The Directors, etc. *v.* Collins, 7 H. L. Cas. 194; Coxon *v.* Railway, 5 H. & N. 274.

courts which have adopted the English rule[13] permit actions to be brought against any of the connecting carriers upon whose lines the loss or damage may have occurred; but there can be no doubt but that, in such cases, the carrier who is sued is entitled to every advantage from the contract for the carriage which the contracting carrier could himself derive from it.

Sec. 474. (§ 277c.) By what law contract is to be construed.—The question, by what law the contract is to be construed, is an interesting and important one, but as the whole matter has been considered in previous sections, the question will not be reviewed here.[14]

Sec. 475. (§ 278.) The consideration necessary to uphold such contracts.—But, like all contracts, in order to be binding upon those who enter into them, those which are entered into by the carrier and his employers must be upheld by some consideration.[15] So far as the carrier is concerned, the consideration consists in the diminution of the risk which he assumes. But the consideration derived from the agreement by the owner of the goods is not always so apparent. As the common carrier is bound to carry without any contract limiting his liability, and may be compelled to do so when his compensation is tendered, his mere agreement to carry does not furnish a consideration for the agreement to limit his liability, and if his rate of compensation were so fixed by law that he could charge neither more nor less than a given amount for the service which is required

13. *Ante*, § 236.

14. See *ante*, §§ 199-224.

15. Rosenfield *v.* The Railway, 103 Ind. 121, 2 N. E. Rep. 344; Railroad Co. *v.* Holland, 162 Ind. 406, 69 N. E. Rep. 138, 63 L. R. A. 948; McFadden *v.* The Railway, 92 Mo. 343, 4 S. W. Rep. 689, 1 Am. St. Rep. 721; Wehmann *v.* The Railway, 58 Minn. 22, 59 N. W. Rep. 546; Southard *v.* The Railway, 60 Minn. 382, 62 N. W. Rep. 442, 619; German, etc. Co. *v.* The Railway, 38 Iowa, 127; Gardner *v.* The Railway, 127 N. Car. 293, 37 S. E. 328; Railway Co. *v.* Gilbert, 88 Tenn. 430, 12 S. W. Rep. 1018, 7 L. R. A. 162; Railway Co. *v.* McIntyre, (Tex. Civ. App.) 82 S. W. Rep. 346; Louisville, etc. R. Co. *v.* Oden, 80 Ala. 38; Mouton *v.* The Railroad, 128 Ala. 537, 29 So. Rep. 602; York Co. *v.* Central Railroad, 3 Wall. 107.

of him, it would be difficult to find in the contract to carry for the legal rate any consideration which could make such contract obligatory upon his employer. But such is not the case, and the compensation for the service of the carrier is always subject to the agreement of the parties. The law, therefore, will presume that in fixing the amount of compensation which he is to receive, something has been allowed to his employer in the way of a reduced rate as the consideration to him for agreeing to a reduced responsibility on the part of the carrier; and where it is claimed that no such reduced rate was in fact allowed him, it will require clear and satisfactory evidence to rebut the presumption that the diminished responsibility was assumed in consideration of a reduced rate.[16] It is held by some courts,[17] however, that the mere fact that the contract to carry contains a limitation upon the carrier's common law liability will give rise to no presumption that the limitation was based upon a reduced rate of compensation, and that, unless it can be shown that the rate charged was less than the usual rate for shipments under the common law liability, the limitation will be without a consideration to support it and will not be obligatory upon the sender of the goods. But while an agreement that the carrier shall assume a diminished responsibility will ordinarily give rise to a presumption that some concession in the way of a reduced rate has been allowed to his employer, if it is shown that the rate charged by the carrier was the usual and customary rate for similar kinds of shipments made subject to his full common

16. Schaller *v.* The Railway, 97 Wis. 31, 71 N. W. Rep. 1042; Stewart *v.* The Railway, 21 Ind. App. 218, 52 N. E. Rep. 89; Wehmann *v.* The Railway, 58 Minn. 22, 59 N. W. Rep. 546; York Co. *v.* Railroad Co., 3 Wall. 107; Cau *v.* Railroad Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; *s. c.* 113 Fed. 91, 51 C. C. A. 76; Arthur *v.* Railway Co., 139 Fed. 127, —— C. C. A. ——.

17. Kellerman *v.* Railroad Co., 136 Mo. 177, 34 S. W. Rep. 41, 37 S. W. Rep. 828; Duvenick *v.* Railroad Co., 57 Mo. App. 550; Paddock *v.* Railway Co., 60 Mo. App. 328; Keyes, Marshall Bros. Livery Co. *v.* Railroad Co., —— Mo. App. ——, 87 S. W. Rep. 553; Sloop *v.* Railroad Co., —— Mo. App. ——, 84 S. W. Rep. 111; Phoenix Powder Mfg. Co. *v.* Railroad Co., —— Mo. ——, 94 S. W. Rep. 235; *s. c.* 101 Mo. App. 442, 74 S. W. Rep. 492.

law liability, and that no concession of any sort was in fact allowed, the limitation will rest upon no consideration and will not relieve the carrier.[18] And although it may be recited in the contract of shipment that the rate charged is less than the usual tariff rate, such a recital is not conclusive and may be explained or contradicted by other evidence tending to show that the rate charged was the usual tariff rate.[19] But where the contract was for an interstate shipment, and abatement of rates was prohibited by an act of congress, it was held that, the contract being silent on the subject, a rebate would not be presumed, and that the full common law liability attached irrespective of the limitations contained in the contract.[20]

Sec. 476. (§ 279.) Contract must have a fair construction. —The intent of the parties to such contracts is, of course, as in all other cases, to be gathered from the whole instrument. But

18. Richardson *v.* Railway Co., 149 Mo. 311, 50 S. W. Rep. 782, 13 Am. & Eng. R. Cas. (N. S.) 170; McFadden *v.* Railway Co., 92 Mo. 343, 4 S. W. Rep. 689; Ficklin & Son *v.* Railroad Co., —— Mo. App. ——, 92 S. W. Rep. 347; Summers *v.* Railroad Co., —— Mo. App. ——, 79 S. W. Rep. 481; Kellerman *v.* Railroad Co., 136 Mo. 177, 34 S. W. Rep. 41, 37 S. W. Rep. 828; Ficklin *v.* Wabash R. Co., —— Mo. App. ——, 93 S. W. Rep. 847.

Where the rate charged is that established by law, and only that rate is offered to the shipper, a special provision limiting the carrier's liability is void. Railroad Co. *v.* Insurance Co., 79 Miss. 114, 30 So. Rep. 43.

But see Nelson *v.* Railroad Co., 48 N. Y. 498; Rubens *v.* Ludgate Hill S. S. Co., 65 Hun, 625, 20 N. Y. Supp. 481.

19. The reduction in charge in order to support a contract for a limited liability must be real and not fictitious. A mere recital, therefore, that the abatement is made and accepted by the shipper will not be conclusive, but will be open to explanation or contradiction by parol evidence for the purpose of showing what the real transaction was. Railroad Co. *v.* Holland, 162 Ind. 406, 69 N. E. Rep. 138, 63 L. R. A. 948, citing Railway Co. *v.* Weakly, 50 Ark. 397, 8 S. W. Rep. 134, 7 Am. St. Rep. 104; Railroad Co. *v.* Reid, 91 Ga. 377, 17 S. E. Rep. 934; Railroad Co. *v.* Crawford, 65 Ill. App. 113; Railway Co. *v.* Reynolds, 17 Kan. 251; Railway Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. Rep. 565. See also, Chicago, etc. R'y Co. *v.* Hare, —— Ind. App. ——, 75 N. E. Rep. 867.

20. Wehmann *v.* Railway Co., 58 Minn. 22, 59 N. W. Rep. 546.

this general rule of construction, when applied to the contracts of carriers with their employers, especially when such contracts are created by the acceptance of their carefully prepared receipts, is to be understood with the qualification just stated, that when their meaning is doubtful or ambiguous, that construction will be put upon them which is less favorable to the carrier, and that their language, in order to exclude his liability, should be clear, and its meaning unmistakable. But while care is to be taken not to extend their meaning so as to embrace immunity which was never intended, it is equally important to guard against the other extreme of excluding risks which are fairly embraced. Examples have been given in which the courts have put upon them the very narrowest construction which their terms would justify, especially when the effort has been on the part of the carrier to screen himself from the consequences of negligence, or to throw the whole risk upon his employer. Such cases show the inclination of the law, even while it permits him to contract for a limited liability, to look with some jealousy upon such contracts. This no doubt grows, in part, out of the fact that they are almost universally in the terms prepared by the carrier himself, and are rarely if ever scrutinized by those who intrust their goods to him; and certainly this is a potent reason why nothing which is not clearly expressed should be understood in his favor.

Sec. 477. (§ 280.) Carrier liable notwithstanding exemption if the loss be the result of his negligence.—Whenever the carrier claims exemption from liability by virtue of his contract, if it appear that the loss occurred from his negligence, even though it be from a cause excepted in the contract, he will be liable for the loss notwithstanding the contract, unless liability for loss by negligence be distinctly excepted, whenever by the rules of law that may be done, as in England and some of the American states.[21] If, for instance, the contract should exempt

21. See cases cited in § 450, *ante*.

This would be true where the stipulation relieved the carrier from liability for loss from suffocation of the animals. McFall *v.* Railway Co., —— Mo. App. ——, 94 S. W. Rep. 570.

him from liability for losses by fire, and it should be made to appear that the fire was the result of his negligence, or that it might with proper diligence have been extinguished before the damage was done, he will be held liable. The cases upon this subject, where the loss has occurred from fire occasioned or not prevented by the negligence of the carrier, are numerous.[22] Negligence and misfeasance universally deprive the carrier of all advantage which he might have otherwise derived, either from defenses based upon inevitable accident, the act of God, or contract, unless such contract cover his negligence; and even then it will not avail him unless, as we have seen by the law of the particular country, such exemption is considered just and reasonable.

Sec. 478. Carrier liable, though exemption from negligence would otherwise be sustained, if loss occasioned by his misfeasance.—Although the law, as in some states permits exemption by contract from the results of negligence, the contract cannot avail if the act of the carrier or his servants amounts to misfeasance. But "it would be trifling with contracts deliberately made by shippers, and the decisions of our courts, and saying in effect that they could not, by any contract, limit or restrict their common-law liability, to hold that by calling ordinary neglect, from which a loss ensues, 'misfeasance,' or 'an abandonment of

22. Montgomery, etc. R. R. *v.* Edmonds, 41 Ala. 667; York Company *v.* Cent. R. R., 3 Wall. 107; Steinweg *v.* Railroad, 43 N. Y. 123; N. J. S. Nav. Co. *v.* Merchants' Bank, 6 How. 344; Railroad Co. *v.* Reeves, 10 Wall. 176; Lamb *v.* Railroad, 46 N. Y. 271; Erie Railroad *v.* Lockwood, 28 Ohio St. 358; Insurance Co. of North America *v.* Railroad Co., 152 Ind. 333, 53 N. E. Rep. 382; Hutkoff *v.* Railroad Co., 61 N. Y. Supp. 254, 29 Misc. 770; *affirmed*, 63 N. Y. Supp. 198, 30 Misc. 802; Railway Co. *v.* McFadden, (Tex. Civ. App.) 32 S. W. Rep. 18; Marande *v.* Railway Co., 184 U. S. 173, 22 Sup. Ct. R. 340, 46 L. Ed. 487; Thomas *v.* Lancaster Mills, 71 Fed. 481, 19 C. C. A. 88, 34 U. S. App. 404, *affirming* 63 Fed. 200.

Where the carrier has failed to make a delivery at destination, the jury will be entitled to infer negligence and a contract exempting the carrier from liability cannot avail him. Railway Co. *v.* Nicholai, 4 Ind. App. 119, 30 N. E. Rep. 424, 51 Am. St. Rep. 206. See also, *ante*, § 420.

the character of carriers,' the limitation was nullified and the full common-law liability established. The act which will deprive the carrier of the benefit of a contract for limited liability fairly made must be an affirmative act of wrong-doing, not merely ordinary neglect in the course of the bailment. It need not necessarily be intentional wrong-doing, but the mere omission of ordinary care in the safe-keeping and carriage of goods is not the misfeasance intended by the authorities."[23]

Sec. 479. Or, though exemption be for losses resulting from delay, if delay is occasioned by negligence.—Where the carrier has stipulated that he will not be liable for losses resulting from a delay in transportation, he cannot avail himself of the exemption if the delay has been occasioned by his negligence.[24] But where, as in England, the carrier is permitted to contract against the consequences of his negligence, a stipulation that he will not be liable for losses arising from a negligent delay will be upheld.[25]

Sec. 480. Or if he departs from the stipulated method of transportation—When departure will be excused.—So if the carrier depart from the stipulated method of transportation, his contract for exemption will not avail him, but during such departure he will be subject to his common-law responsibility for losses then occurring.[26]

Thus, if he stipulates for transportation entirely by rail, but carries part of the way by steamboat;[27] or if he agrees to carry by canal, but sends the goods by sea;[28] or if he undertakes that

23. Magnin *v.* Dinsmore, 70 N. Y. 410. Where the carrier is guilty of a conversion of the goods, the contract for exemption will not avail him. Railway Co. *v.* Fifth National Bank, 26 Ind. App. 600, 59 N. E. Rep. 43.

24. Parker *v.* The Railroad, 133 N. Car. 335, 45 S. E. Rep. 658, 63 L. R. A. 827; Bosley *v.* The Railroad, 54 W. Va. 563, 46 S. E. Rep. 613, 66 L. R. A. 871.

25. Foster *v.* The Railway, 2 K. B. (1904) 306, 73 L. J. K. B. 811.

26. Robinson *v.* Transportation Co., 45 Iowa, 470; Hand *v.* Baynes, 4 Whart. 204; Collins *v.* Railroad Co., 11 Excheq. 790; Galveston, etc. R. Co. *v.* Allison, 59 Tex. 193; Graham *v.* Davis, 4 Ohio St. 362; Sleat *v.* Flagg, 5 B. & Ald. 342; Goodrich *v.* Thompson, 44 N. Y. 324; *post*, §§ 617-619.

27. Maghee *v.* Railroad Co., 45 N. Y. 514; *post* § § 618, 619.

28. Hand *v.* Baynes, *supra.*

the goods shall go through without change of cars, but transfers them on the way;[29] or if he contracts to care for the goods while in transit, but fails to exercise the requisite care;[30] or if he agrees to transport the goods by passenger train service, but sends them forward by freight train,[31] he will be liable, notwithstanding his contract for exemption, for injuries happening during such deviation. So if the carrier discriminates against the shipper in the time or rapidity of forwarding his goods,[32] he will lose the benefit of exemptions which otherwise might have protected him. But a well known and notorious usage may be an important factor in determining whether there has been a departure from the stipulated method of transportation; and if such a usage sanctioning a departure be proven, the usage not contradicting but simply explaining the terms of the contract, full force and effect will be given an exemption from liability where the loss has occurred during such a departure.[33]

Where, however, there is a breach of the contract of carriage, and such breach occurs upon the stipulated route, as where the carrier has stipulated that the goods shall be carried by a stipulated route but owing to a mistake on his part he neglects to transfer the goods at an intermediate station at which point it is necessary to transfer them to another train in order that they may be forwarded by the stipulated route and within the time contemplated, he will not be deprived of the benefit of exemptions from liability contained in his contract if, in order to decrease the sum for which he would be liable, he forwards the goods by another route than that provided for in the contract.[34]

Sec. 481. (§ 281.) Exceptions to liability in the bills of lading of carriers by water.—Something remains to be said in this chapter upon the subject of the exceptions always to be

29. Robinson *v.* Transportation Co., *supra.*

30. Hunnewell *v.* Taber, 2 Sprague, 1.

31. Pavitt *v.* Railroad Co., 153 Penn. St. 302, 25 Atl. Rep. 1107.

32. Keeney *v.* Railroad Co., 47 N. Y. 525.

33. Robertson *v.* Steamship Co., 139 N. Y. 416, 34 N. E. Rep. 1053, *reversing* 17 N. Y. Supp. 459.

34. Foster *v.* Railway Co., 2 K. B. (1904) 306, 73 L. J. K. B. 811.

found in the bills of lading of carriers by water, and which are peculiar to them. From the remotest times, and long before carriers by land had begun to put any limit upon their common-law liability by contract or notice, it had become common for carriers by sea to provide for themselves a somewhat more extensive protection than was allowed them by the exceptions of what were known as the acts of God and of the king's enemies, the benefit of which the law always allowed them, as we have seen, by inserting in their bills of lading exceptions also of the perils or dangers of the seas; and this limitation of their liability by contract to this extent with their employers became at length, from long usage, one of their conceded rights. And when the carrying business upon rivers and other internal bodies of water became of sufficient importance to demand it, the words were extended so as to include not only the perils and dangers of navigation upon the high seas, but also of river and other water navigation.[35]

Sec. 482. (§ 282.) Same subject—Perils of the sea—Dangers of navigation.—This exception is one of the highest importance to carriers upon the rivers of this country, especially upon our western rivers, which, owing to continually shifting currents and other unexpected obstructions to their navigation, make the carrying business upon them more than ordinarily dangerous; and for this reason, as we have seen, some of the courts have held that losses occurring in their navigation from such causes come within the exceptions of the acts of God from which the carrier is protected independently of contract. "It is to be observed," say the court in Steamboat Company *ads.* Bason,[36] "that in our river navigation, owing to forests upon their banks

35. The earliest mention of the exception of the perils of the sea in a bill of lading or charter-party is said to be in Pickering *v.* Barkley, Style, 132, which is copied in full, *ante*, § 316.

The English bill of lading, as it is called in Laveroni *v.* Drury, 8 Exch. 166, contains exceptions of "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever." Abbott on Ship. 322.

36. Harper, Law, 262.

and frequent inundations, hidden snags frequently occur and constitute a danger peculiar to rivers so situated; and from the frequent shiftings of these snags and their recurrence from freshets, they constitute in our rivers an instance of the *actus Dei* which skill and experience cannot guard against." Hence the provision against the dangers of navigation is never omitted from the bills of lading of those engaged in transporting goods upon our rivers.

Sec. 483. Same subject—Perils of the sea, etc., not synonymous with act of God, etc.—While perils of the sea have been said to refer to those accidents peculiar to navigation which are of an extraordinary character, or which arise from some irresistible force or overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence,[37] such exceptions are by no means synonymous with those of the acts of God and of the king's enemies. They have a more extensive signification, and include many perils which, according to the construction which has been given to those words, would not come within the meaning of the acts of God or of the king's enemies.[38] They include many casualties which the agency of man has concurred in producing, which, as we have seen, would preclude them from being treated as the acts of God. Thus, disasters from collisions, where the carrier who claims exemption from liability from the loss thereby occasioned by reason of such an exception in his contract is not in fault, are held to be embraced in the meaning of the term "the dangers of navigation."[39] But if such loss might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not to be deemed in the sense of the phrase such a

37. The Arctic Bird, 109 Fed. 167.

38. Gordon *v.* Buchanan, 5 Yerg. 71; McArthur *v.* Sears, 21 Wend. 190; Hays *v.* Kennedy, 41 Penn. St. 378; Williams *v.* Branson, 1 Murphey, 417; Whitesides *v.* Thurlkill, 12 Sm. & M. 599; Garrison *v.* Insurance Co., 19 How. 312; Story on Bail. § 512; The Schooner Reeside, 2 Sum. 567; Plaisted *v.* Navigation Co., 27 Me. 132; Steamship Co. *v.* Burrows, 36 Fla. 121, 18 So. Rep. 349.

39. The Xantho, 12 App. Cas. 503; Garston Co. *v.* Hickie, 18 Q. B. Div. 17.

loss by the perils of navigation as will exempt the carrier from liability, but rather as a loss attributable to his negligence.[40] And when a ship was run down in open daylight and in moderate weather by one or two other ships sailing in an opposite direction to her, but under such circumstances that no blame could be attached to any of the vessels, the accident was held to have happened by a peril of the sea, and to come within the exception.[41]

Sec. 484. (§ 284.) Same subject—What included—Illustrations.—So where the master of a vessel on a foggy night, in entering a port, mistook the signal lights and ran his vessel aground, whereby the cargo was damaged, a misfortune happening under almost precisely the same circumstances which were held in McArthur *v.* Sears[42] not to be attributable to the act of God, and for which, therefore, the carrier in that case was held liable, it was held that he was protected from liability by the clause in his bill of lading providing against the perils of navigation.[43]

Sec. 485. (§ 285.) Same subject—Jettison, when included.—So a jettison made necessary by a tempest is, in ordinary cases, a loss by the perils of the sea.[44] But, if it be rendered necessary by any fault of the master or owners of the vessel, it will be attributed to such fault and not to the peril of the sea, though the latter may cause the immediate necessity for it. And in the case in which this was held the carrier was held to have been in fault, because in the night and in a fog he entered by mistake the wrong port, supposing it to be the port of destination, when he could with safety have remained outside until

40. Hays *v.* Kennedy, 41 Penn. St. *supra;* Whitesides *v.* Thurlkill, *supra;* Abbott on Ship. 240; Story on Bail. § 514; Costigan *v.* Transportation Co., 33 Mo. App. 269; Woodley *v.* Michell, 11 Q. B. Div. 47; Nill *v.* Sturgeon, 28 Mo. 328.

41. Buller *v.* Fisher, 3 Esp. 67.

42. 21 Wend. 190.

43. The Juniata Paton, 1 Biss. 15.

44. Gillett, *v.* Ellis, 11 Ill. 579; Lawrence *v.* Minturn, 17 How. 100; The Bergenseron, 36 Fed. Rep. 700; The Marlborough, 47 Fed. 667.

morning. Being in doubt, prudence should have restrained him from entering the port until morning; and having ventured in and grounded in the night, which made the jettison necessary, he could derive no benefit from such a clause in his bill of lading.[45] To the same effect is the case of The Delaware,[46] in which it was shown that the goods were jettisoned in a storm, and the carrier claimed exemption from liability under the clause in his bill of lading excepting losses from the perils of the sea. But it also appearing that the goods, without the consent of the shipper, had been stowed on deck, contrary to the duty of the carrier, he was allowed to take no benefit from the exception. And where the master and crew became panic stricken and drove overboard a number of head of cattle, it appearing that the vessel did not encounter any extraordinary or unusual stress of weather, the owners of the vessel were not allowed to take advantage of the exemption from liability for losses arising from the perils of the sea.[47]

Sec. 486. (§ 286.) Same subject—Hidden obstructions.— So if an obstruction be recently placed in a navigable stream and be hidden and unknown, such as no human prudence or foresight could have guarded against, and the carrier's boat be run upon it and sunk, he will be protected by the exception of the dangers of navigation in his bill of lading.[48] And under a bill of lading for goods to be delivered in good condition, "the damages of the seas and fire only excepted," the carrier is not liable for a loss of the goods occasioned by the striking of his boat on a hidden obstruction of recent origin in the channel of the river, causing it to sink while being towed upon the river, without fault or negligence on his part. Such an obstruction, it was said, was a peril of the sea.[49]

45. The Portsmouth, 9 Wall. 682.

46. 14 Wall. 579.

47. Compania de Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398, *affirming* 35 U. S. App. 44, and 61 Fed. 860; *s. c.* 57 Fed. 403.

48. Johnson *v.* Friar, 4 Yerg. 48; Gordon *v.* Buchanan, 5 *id.* 71; Chouteaux *v.* Leech, 18 Pa. St. 224.

49. Redpath *v.* Vaughan, 52 Barb. 489. See, also, The Favorite, 2 Biss. 502; Boyce *v.* Welch, 5 La.

Sec. 487. (§ 287.) Same subject—Other perils.—In the case of The Washington Insurance Company *v.* Reed,[50] after stating the law to be that the perils of the seas which constitute a part of the risks in almost every marine policy comprehend those of the winds, waves, lightning, rocks, shoals, collision, and, in general, all causes of loss and damage to the property insured, arising from the elements and inevitable accidents, the court held the underwriters of a policy insuring goods upon a flatboat against the perils of the river liable for damage caused by the waves made by a steamboat passing such flatboat, the court saying that it could see no difference in reason, so far as it concerned the question of what perils were included in the exception, whether the waves were raised by human or by natural means. But in the same court it has been held that, when the carrier relies upon the exception of the dangers of the river in his bill of lading, he must show that the highest degree of skill and care was exercised by him.[51] And in Laurie *v.* Douglass,[52] it was held that the breaking of a rope by which the ship, then in dock and unloading, was made to cant and take in water, whereby a portion of her cargo was damaged, came within the exception of the perils of the seas in her bill of lading.

Sec. 488. Same subject.—But a rush of water through a rent in the side of the vessel, the rent having been caused by an

Ann. 623; Hibernia Ins. Co. *v.* St. Louis Co., 120 U. S. 166; Turney *v.* Wilson, 7 Yerg. 340; Smyrl *v.* Nolan, 2 Bailey, 421.

50. 20 Ohio, 199. Losses from collision or stranding are within the perils of the sea. Liverpool, etc. Steam Co. *v.* Insurance Co., 129 U. S. 397.

51. Graham *v.* Davis, 4 Ohio St. 362. "The ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception in the bill of lading of perils of the sea or other specified perils does not excuse him from that obligation or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed." Gray, J., in Liverpool Steam Co. *v.* Insurance Co., *supra*, citing Navigation Co. *v.* Bank, 6 How. 344; Express Co. *v.* Kountze, 8 Wall. 342; Transportation Co. *v.* Downer, 11 Wall. 129; Grill *v.* Screw Co., L. R. 1 C. P. 600; *s. c.* L. R. 3 C. P. 476; The Xantho, L. R. 12 App. Cas. 503, 510, 515.

52. 15 M. & W. 746.

unforeseen explosion of blasting caps, was held not to come within an exception of perils of the seas or accidents of navigation.[53] Nor will damage occasioned by rats gnawing a hole in a water pipe, causing water to escape and injure the cargo, be considered a peril of the sea.[54] So an injury to the vessel caused by worms is not a peril of the sea within an exemption from liability for perils of the seas.[55] But damage occasioned by sea water entering the ship's ventilator holes, after the ventilators had been carried away by a heavy gale, was held to have been caused by a peril of the sea within the exemption of the bill of lading.[56] So where logs, having been brought alongside the vessel for the purpose of being loaded, were caused to go adrift by a heavy gale, it was held that the loss was caused by a peril of the sea within the clause for exemption from liability for losses due to such causes.[57] And where a loss resulted from the giving

53. The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. Rep. 9, 43 L. Ed. 234, *reversing* American Sugar Refining Co. *v.* The G. R. Booth, 64 Fed. 878, *s. c.* 91 Fed. 164, 33 C. C. A. 430.

54. The Euripides, 71 Fed. 729, 38 U. S. App. 1, 18 C. C. A. 226, *reversing* 63 Fed. 140, and 52 Fed. 161.

55. The Giles Loring, 48 Fed. 463.

56. The Dunbritton, 73 Fed. 352, 19 C. C. A. 449, 38 U. S. App. 369, *reversing* Crooks *v.* The Dunbritton, 61 Fed. 764.

But the damage of cargo by seawater entering the hold, through the negligent calking of the hatches, is not due to a peril of the sea. The Glide, 78 Fed. 152, 24 C. C. A. 46.

A severe storm, during which all the sails of the vessel are blown away, her foreboom broken and both her anchors parted from their chains is a peril of the sea which justifies her abandonment. The Calvin S. Edwards, 50 Fed. 477, 1 C. C. A. 533, 1 U. S. App. 173, *aff'g* 46 Fed. 815.

The mere rolling of a vessel in a cross sea is not of itself a peril of the sea. But a loss which is sustained during cross seas of unusual violence may be fairly attributed to a peril of the seas. The Frey, 106 Fed. 319, 45 C. C. A. 309, *reversing* 92 Fed. 667.

57. Munson S. S. Line *v.* Steiger & Co., 132 Fed. 160; *s. c.* 136 Fed. 772.

It cannot be presumed that a greater liability was intended to be contracted for as to cargo delivered alongside the ship, than for cargo received aboard for which bills of lading are outstanding. When, therefore, bills of lading contain exceptions as to perils of the sea, and pieces of timber are received alongside the ship, the carrier will not be liable if they are lost through a violent storm

way of a stanchion in heavy weather, it was considered that the loss fell within a clause providing for exemption from liability for all damage and accidents of the seas and navigation.[58]

Sec. 489. (§ 288.) Same subject—Other perils—Fire not included.—Losses by fire, though it may be accidental, do not come within the exception of the perils or dangers of the seas in bills of lading,[59] though this and other losses may be excluded.[60] And the fact that fire produces the motive power of the vessel makes no difference.[61] Nor does the explosion of the boiler of a steam vessel come within the exception,[62] though it has been held that the escape of steam without the fault of the officers of the boat, whereby mules which are being carried as freight, and which were properly stationed on the boat, were injured, came within the meaning of the exception of the perils of navigation.[63] And where the carrier of cattle put them in a lighter to be landed, which was the customary mode, confining them by a chain

of wind. Southerland-Innes Co. *v.* Thynas, 128 Fed. 42, 64 C. C. A. 116.

58. The Exe, 57 Fed. 399, 6 C. C A. 410, 14 U. S. App. 626, *reversing* 52 Fed. 155.

See also, The Folmina, 143 Fed. 636.

59. New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; Garrison *v.* The Memphis Ins. Co., 19 *id.* 312; Parsons *v.* Monteath, 13 Barb. 353; Swindler *v.* Hilliard, 2 Rich. 286.

60. Losses from sweating, heating, etc., may be provided against if carrier not negligent. The Portuense, 35 Fed. Rep. 670; The Keystone, 31 Fed. Rep. 412; The Jefferson, *id.* 489; Wolff *v.* The Vaderland, 18 Fed. Rep. 739. So a loss by leakage may be provided against, and relieve the carrier if goods were properly stowed (The Barracouta, 39 Fed. Rep. 288), but not if defectively stored. The Britannia, 34 Fed. Rep. 906. Leakage means leaking of the cask or can and not leaking of the ship (Hill *v.* Sturgeon, 28 Mo. 323), nor leaking from other goods. Thrift *v.* Youle, 2 C. P. Div. 434. So of breakage or drainage. The Bitterne, 35 Fed. Rep. 927. So loss from fire "at any time or place" before or after loading. The Egypt, 25 Fed. Rep. 320; Hall *v.* Railroad Co., 14 Phila. 414; Scott X. Steamship Co., 19 Fed. Rep. 56; Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110.

61. New Jersey Steam Nav. Co. *v.* Merchants' Bank, *supra;* Hale *v.* The N. J. Steam Nav. Co., 15 Conn. 539; Singleton *v.* Hilliard, 1 Strob. Law, 203.

62. Bulkley *v.* The Naumkeag, etc. Co., 24 How. 386; The Mohawk, 8 Wall. 153; McCall *v.* Brock, 5 Strob. Law, 119.

63. Union Ins. Co. *v.* Groom, 4 Bush, 289.

running fore and aft, to which they were tied, and before they could be landed they became violent, broke the chain and some of them were drowned, the loss was held to have been by the perils of the sea.[64]

Sec. 490. (§ 289.) Same subject—How question determined.—These are given as a few of the many illustrations which might be given from the decided cases upon this subject.[65] The question, what is and what is not to be included in such exceptions, has perhaps more frequently arisen between the insurer and the insured in actions upon policies than between the carrier and his employer. The distinction in such cases is that the insurer is liable at all events, provided the danger from which the loss has ensued comes within the terms of his policy, while

64. Anthony *v.* Ætna Ins. Co., 1 Abb. Ct. Ct. 343.

65. "Blowing" of bilge water is within exemption of "blowing" and perils of the sea. East Tennessee R. Co. *v.* Wright, 76 Ga. 532. Loss from the motion of the boat is a peril of the sea unless caused by defective stowage. Christie *v.* The Craighton, 41 Fed. Rep. 62. Sweating of a cargo of sugar in a storm is a sea peril. Matthiessen Co. *v.* Gusi, 29 Fed. Rep. 794. But a loss which is the result of ordinary wear and tear or of the employment of the vessel in the usual course of navigation is not a loss by "perils of the sea." The term may be defined as denoting all marine casualties resulting from the violent action of the elements as distinguished from their natural, silent influence upon the fabric of the vessel; casualties which may and not consequences which must occur. The Warren Adams, 74 Fed. 413, 20 C. C. A. 486, 38 U. S. App. 356, writ of *certiorari* denied, 163 U. S. 679. Damage from coal dust is not a peril of the sea (Hills *v.* Mackill, 36 Fed. Rep. 702), nor is an injury to cargo by rats. The Isabella, 8 Ben. 139. *Contra*, where water admitted through holes made by rats, Hamilton *v.* Pandorf, 12 App. Cases, 518. Shipping water is a peril of sea (The Chasca, 23 Fed. Rep. 156), and so is leakage (The Blue Jacket, 10 Ben. 248; Evans *v.* Spreckels, 45 Fed. Rep. 265); and the breaking of the tiller rope without negligence is an "unavoidable danger of navigation. The Morning Mail, 17 Fed. Rep. 545. Desertion by seamen is not a peril of the sea, The Ethel, 5 Ben. 154. Burden of proof is on carrier to show loss to be within exemption. The C. J. Willard, 38 Fed. Rep. 759; The Thos. Melville, 31 *id.* 486; The Lydian Monarch, 23 *id.* 298; The Sinnickson, 24 *id.* 304; The Polynesia, 16 *id.* 702. But see The Jefferson, 31 Fed. Rep. 489; The Stevenson, 17 *id.* 540.

the carrier is not liable if he has provided against his liability for the loss from the particular cause in his bill of lading, unless it can be shown that he has been negligent to such a degree as to have brought about the loss when it would not otherwise have occurred, or has been remiss in his duty in endeavoring to avoid it. Otherwise, it is presumed, that the construction of such terms, and whether a particular loss falls within them, will be the same whether the question be upon a policy of insurance or a bill of lading. What they mean cannot of course be exactly determined, nor their import precisely settled.[66] The most that can be said perhaps is that they include only the dangers or accidents of navigation upon the seas or rivers, or other inland waters which are not embraced by the well known exceptions made by the law to the carrier's liability, the acts of God and the public enemy, and are yet such that they cannot be avoided by any prudence or foresight or ordinary skill on his part,[67] and

66. Story on Bail., sec. 512.

67. In Garrison *v.* Memphis Ins. Co., 19 How. 312, the language used is: "These words include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man nor are to be prevented by human prudence; and have been extended to comprehend losses arising from some irresistible force or overwhelming power which no ordinary skill could anticipate or evade. They exonerate a carrier from a liability for a loss arising from an attack of pirates or from a collision of ships when there is no negligence or fault on the part of the master and crew. Latterly the courts have shown an indisposition to extend the comprehension of these words. The destruction of a vessel by worms at sea is not accounted a loss by the perils of the sea; nor was a damage from bilging arising in consequence of the insufficiency of tackle for getting her from the dock; nor was damage occasioned to a vessel by her props being carried away by the tide while she was undergoing repairs on the beach, excused, as falling within that exception." And in the case of McArthur *v.* Sears, 21 Wend. 190, where the question was whether the disaster came within the exception of the act of God, there being no bill of lading, Cowen, J., after discussing the question, goes on to say: "There is a considerable class of cases arising upon exceptions in bills of lading of the 'perils of the sea,' where in addition to losses from *natural causes*, those arising from the acts of third persons are sometimes allowed to come within the terms. Such are losses by robbery of pirates. Pickering *v.* Barkley, Style, 132; 2 Rolle's Abr. 248; Buller *v.* Fisher, Ab. on Ship.

that they exempt him from the absolute liability of the common carrier, but not from the consequencees of a want of that reasonable skill, diligence and care, the absence of which constitutes what is known as negligence.

Sec. 491. (§ 290.) Same subject—Carrier liable, notwithstanding exception, for loss from theft, embezzlement, robbery,

pt. 3, ch. 4, § 2. And the collision of ships without the fault of either party. But these words are evidently of broader compass than the words 'act of God'; and although it was supposed by a very learned judge that they were but commensurate (Gould, J., in Williams *v.* Grant, 1 Conn. 487), and therefore whatever was a peril of the sea would excuse the carrier acting under his general liability, yet it is evident from the cases we have considered that they are not always so. The distinction was adverted to but not much examined by Story, J., in The Schooner Reeside, 2 Sumn. 571. The case of Aymar *v.* Astor, 6 Cowen, 266, was an action on a bill of lading excepting the dangers of the seas. The goods were damaged on the voyage by rats; and it was held that the defendants having taken every precaution to avoid their depredations, the loss was by a danger of the sea within the policy. This case, we noticed before, has been treated as tending to upset the law extending the implied liability of common carriers to the water. The case itself has no such tendency." "Cases as to the meaning of the words 'perils of the sea' often arise also upon policies of insurance. For instance, it was held that the loss of a ship by the sudden impressment of sailors sent on shore to fasten it was a loss within the policy. Hodgson *v.* Malcolm, 5 Bos. & P. 336. Yet it seems clear, on the cases, that such an act could not be received to exempt a common carrier either as the act of God or of the enemies of the state. It may be irresistible. So we have seen of many acts merely human; still they may be collusively committed. The carrier may collude with the press gang as well as with robbers or illegal kidnapers. The difficulty returns therefore; if we receive the immediate agency of third persons in any shape, we open the very door for collusion which has denied an excuse by reason of theft, robbery and fire. Marsh *ads.* Blythe, 1 Nott & McCord, 170, which held it a defense that the carrier's vessel was, without his fault, run down by another, is an instance in which the rule in respect to the special exception in a bill of lading has been applied to the carrier's general liability. There may be other cases of a like character; but it seems clearly to me, from authorities I have been able to consult, that the expression 'perils or dangers of the sea,' or 'dangers of the river,' etc., will be found to allow, in several cases, human agency and other causes to excuse a loss which cannot be allowed in favor of common carriers without giving up the rigorous obligation

etc.—Consequently, notwithstanding these exceptions in his bill of lading, the carrier remains liable for embezzlement, theft, robbery, the violence of mobs and depredators, provided they are not pirates, in the same manner as he would have been without them, losses from such causes arising entirely from human agency, and being such as may be provided against. In King *v.* Shepherd,[68] a box of sovereigns was shipped under a bill of lading containing the usual exceptions against the perils of the seas. The vessel was wrecked on the voyage and the box was stolen; and it was held that the master and owners were responsible for its value, theft and robbery being perils of the seas only when committed by pirates, but not where committed by persons coming to the ship when she was not upon the high seas or by those on board. Nor are depredations upon a cargo by passengers and crew in consequence of scarcity of provisions, owing to the length of a voyage, perils of the sea. In the case of The Gold Hunter,[69] it appeared that owing to the length of the voyage, the ship's provisions became so scarce that the crew and passengers had to be put upon half rations, which caused the passengers to become so ungovernable that they could not be restrained from seizing upon and consuming a portion of the freight. It was nevertheless held that the master and owners of the vessel were liable.

Sec. 492. (§ 290a.) Same subject—Carrier liable notwithstanding exemption if loss caused by negligence.—And in accordance with the general rule, these exemptions will afford the carrier no protection where the loss was caused by the negligence of himself or his servants[70] unless he has expressly con-

imposed upon them by the policy of the law."

68. 3 Story, 349.

69. 1 Bl. & H. 300.

70. Thus a stipulation in a bill of lading exempting the owner from liability for losses caused by vermin will not excuse him for a loss from rats if he negligently omitted to fumigate his ship. Stevens *v.* Navigation Co., 39 Fed. Rep. 562.

So a vessel is liable, notwithstanding exemption, where the vessel is stranded because a hazardous passage was unnecessarily selected (The Fred H. Rice, 40 Fed. Rep. 690), or the master neglects usual precautions (The Montana, 17 *id.* 377); and, though

tracted against liability for negligence, and by the rules of law of the particular country such a contract is not considered unreasonable.[71]

perils of sea are provided against, if goods are injured from water admitted through mistake of officer (The Bergenseren, 36 Fed. Rep. 700), or other negligence (Norman *v.* Binnington, 25 Q. B. Div. 475); and, though sweating exempted, if caused by defective storage (Paturzo *v.* Company, 31 Fed. Rep. 611; The Keystone, 31 Fed. Rep. 412; Wolff *v.* Vaderland, 18 *id.* 733); and, though leakage exempted, if caused by tampering with cases (The Giglio, 31 Fed. Rep. 432), or bad stowage (The Colon, 9 Ben. 354).

So a carrier of animals will be liable, though loss from disease excluded, where he has neglected to clean his ship after carrying sick animals. Tattersall *v.* Steamship Co., 12 Q. B. Div. 297. But where a vessel was chartered for a cargo of logs, a provision that the cargo was to be delivered alongside the vessel and there held at charterers risk and expense, was held not to be unreasonable as exempting the vessel from liability for the negligence of the master or crew. The Ira B. Ellems, 50 Fed. 934, 2 C. C. A. 85, *affirming* 48 Fed. 591.

71. Goods were shipped under bills of lading which exempted the carrier from liability for "loss or damage resulting from any of the following perils (whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers, or others of the crew, or otherwise howsoever), namely, . . . perils of the seas, rivers, or navigation of whatever nature or kind soever." When the ship was off the port of discharge, the engineer, intending to fill the ballast tank with water for boiler use, opened by mistake the wrong valve and the goods were damaged by sea water. It was held that the damage was caused by a peril of the sea within the exemption of the bills of lading, and that the shipowner was not liable. Blackburn *v.* Navigation Co., (1902), 1 K. B. 290, 71 L. J. K. B. 177, 85 Law T. 783, 50 Wkly. Rep. 272.

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